

82<sup>o</sup>-1349

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES)

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UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

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REX E. LEE  
*Solicitor General*  
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## QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act as a "private individual under like circumstances" for the Federal Aviation Administration's alleged failure to discover a safety defect while carrying out its regulatory duty of certifying the airworthiness of aircraft in commercial aviation.

2. Whether a suit against the United States alleging that the FAA negligently certified an aircraft's design as complying with minimum safety standards as part of its efforts to regulate compliance with those standards is barred as a claim based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

3. Whether a suit against the United States alleging that the FAA negligently inspected and certified the design of a lavatory in an aircraft is barred as a "claim arising out of \* \* \* misrepresentation" within the meaning of 28 U.S.C. 2680(h).

## PARTIES TO THE PROCEEDING

Respondents not named in the caption are listed in Appendix F, *infra*, 18a-24a.



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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, 1a-7a) is reported at 692 F.2d 1205.<sup>1</sup> The findings of fact and conclusions of law of the district court (App. B, *infra*, 8a-13a) are not reported.

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<sup>1</sup> This opinion was originally handed down on October 8, 1982. It was subsequently reissued on October 26, 1982, to include in the caption *Emma Rosa Mascher, et al. v. United States*.

## JURISDICTION

The judgments of the court of appeals in these consolidated cases were entered on October 8, 1982 (App. D, *infra*, 16a; App. E, *infra*, 17a). On December 28, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2674 provides, in pertinent part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances \* \* \*.

28 U.S.C. 2680 provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title [conferring jurisdiction on the district courts] shall not apply to—

(a) Any claim \* \* \* based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

\* \* \* \*

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights \* \* \*.

## STATEMENT

1. In the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. IV) 1301 *et seq.*, Congress has directed the Secretary of Transportation "to promote safety of flight of civil aircraft" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft \* \* \*." 49 U.S.C.

1421(a) and (1). At the same time, Congress has imposed a primary duty on "every person [in the aviation industry] engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply" with the statutory and administrative standards prescribed by the Secretary. 49 U.S.C. 1425(a). See also 49 U.S.C. 1421(b). In order to monitor adequately the aviation industry's compliance with these safety standards, Congress has created a multi-step process for certifying the safety of aircraft, and the Federal Aviation Administration ("FAA"), acting as the designee for the Secretary, has promulgated extensive regulations establishing minimum standards that must be satisfied by the designer or manufacturer of an airplane at each stage in the certification process. Each step culminates in the issuance of a certificate by the FAA; it is unlawful to operate an airplane that does not have a current "airworthiness certificate," which is the final stage in the process. 49 U.S.C. (& Supp. IV) 1430(a).

Before introducing a new type of airplane, the manufacturer must first obtain a "type certificate," which involves FAA approval of the basic design of the aircraft. 49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53. The manufacturer supplies the FAA with blueprints and/or design drawings, which FAA employees examine for compliance with minimum safety standards. Through this process, which may take years to complete, a basic design is approved and a type certificate is issued. See generally National Academy of Sciences, Committee on FAA Airworthiness Certification Procedures, *Improving Air Safety* 19-20 (1980).

The manufacturer then builds a prototype of the aircraft and applies for a "production certificate." 49 U.S.C. 1423(b); 14 C.F.R. 21.131-21.165. This certificate authorizes the manufacturer to produce copies of the prototype so long as they are identical in all respects to the "type" approved. The manufacturer must

supply detailed information regarding materials used and production methods employed. 14 C.F.R. 21.143. In addition, FAA employees inspect the prototype and test fly it "to determine compliance with the applicable [safety standards]." 14 C.F.R. 21.157.

After the manufacturer receives a production certificate, and assuming no limitations are imposed on the certificate, it may begin mass production of the approved aircraft. The manufacturer must, however, obtain an airworthiness certificate for each aircraft that is assembled. This requires that the aircraft be inspected to determine whether it conforms to the prior certifications and the minimum safety standards. 49 U.S.C. 1423(c); 14 C.F.R. 21.171-21.199.<sup>2</sup>

A Class I Export Certificate of Airworthiness may be obtained from the FAA upon request. 14 C.F.R. 21.321-21.339. Such a certificate informs a foreign government that a particular aircraft exported from the United States complies with the approved design and is in condition for safe operation at the time of export.

In light of the extensiveness and complexity of the safety standards (14 C.F.R. 23.1-23.1589) and the large number of aircraft requiring certification, the FAA is unable to monitor or inspect directly every aspect of every design, prototype or assembled aircraft. Accordingly, consistent with the statutory scheme (49 U.S.C. 1425(a)), the regulations impose upon each applicant an obligation, *inter alia*, to "make all inspections and tests necessary to determine \* \* \* [c]ompliance with the applicable airworthiness \* \* \* requirements." 14 C.F.R. 21.33(b) and (1). In addition, the vast majority of the

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<sup>2</sup> An additional certificate is required for aircraft that are altered by the introduction of a major change in the type design. 14 C.F.R. 21.113. In order to obtain a "supplemental type certificate," the applicant "must show that the altered product meets the applicable airworthiness requirements \* \* \*." 14 C.F.R. 21.115(a).



FAA's inspections are performed by "designated engineering representatives," who typically are employees of the manufacturer or operator of the aircraft but are licensed by the FAA. 14 C.F.R. 183.29. For each aircraft, literally dozens of inspections are conducted by different individuals with engineering expertise in a particular area—some federal employees but most not.<sup>3</sup> The FAA-signed certificate does not indicate who conducted the inspection of any particular aspect of the aircraft.

2. This case involves the crash of a Boeing 707 airplane, which was designed, manufactured, tested, inspected and assembled by the Boeing Company (App. B, *infra*, 9a). The Civil Aeronautics Agency ("CAA"), the predecessor of the Federal Aviation Administration, inspected the designs, plans, specifications and performance data for the Boeing 707 aircraft and issued a type certificate in 1958, 15 years prior to the accident at issue here (*ibid.*). The airplane was sold by Boeing for domestic use to Seaboard Airlines, and in 1969, Seaboard sold the plane to respondent Varig Airlines, a Brazilian commercial air carrier (*ibid.*).<sup>4</sup> At that time, the airplane was removed from the United States Civil Aircraft Registry and placed on the Brazilian registry (14 C.F.R. 21.335(e)(1)). Consequently, any FAA airworthiness certificate previously issued to the airplane became invalid and, indeed, was no longer required so long as the plane did not fly within the airspace of the United States (*ibid.*). The ultimate responsibility for

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<sup>3</sup> The nonemployee representatives are not subject to any direct FAA control, but there are spot checks of their work. See generally Dilk, *Negligence of FAA Administration Delegates Under the Federal Tort Claims Act*, 42 J. Air L. & Com. 575, 583 (1976).

<sup>4</sup> Apparently, an Export Certificate was never requested by or issued to respondent Varig or the appropriate Brazilian agency.



regulating the airworthiness of the airplane then rested with the state of registry (in this case, Brazil). See 49 U.S.C. 1401 and 1508(b).

On July 11, 1973, the Boeing 707 airplane crashed while on a commercial flight from Rio de Janeiro to Paris, France (App. B, *infra*, 8a). A few minutes before the scheduled landing at Orly Airport, a fire began in one of the aft lavatories (App. A, *infra*, 2a). Thick, black smoke quickly filled the entire cabin and cockpit area and caused the airplane to make a crash landing into a field a few miles from the airport (*ibid.*). All but 11 of the 135 persons on board the plane died from asphyxiation caused by inhaling toxic gases (*ibid.*). A post-impact fire consumed most of the air fuselage, including the aft lavatory structure and most of the floor and cargo area beneath and forward of the aft lavatories.

3. Following the accident, two consolidated actions were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, in the United States District Court for the Central District of California. The *Varig* suit involved a claim for damages for the destroyed Boeing 707. The *Mascher* suit involved claims for wrongful death brought by families and personal representatives of 62 passengers.<sup>5</sup>

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<sup>5</sup> Representatives of the passengers brought suit in New York state court against Boeing Company, Seaboard World Airlines, and five subcomponent manufacturers. These suits were settled in 1977.

Varig Airlines also brought a separate action against Boeing Company and a subcomponent manufacturer in the United States District Court for the Central District of California. The district court granted summary judgment for the defendants and the court of appeals affirmed. *Varig v. Boeing*, 641 F.2d 746 (9th Cir. 1981); *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co.*, 692 F.2d 1205 (9th Cir. 1982).

Respondents claimed that the pre-impact fire originated in the towel disposal area located in the sink unit of one of the aft lavatories of the airplane and was caused either by an electrical malfunction or by passenger carelessness. They alleged that the towel disposal area was not capable of containing fire as required by FAA regulations and that the FAA was negligent in its inspection of the plane and issuance of a type certificate for the Boeing 707 in 1958—15 years prior to the crash.<sup>6</sup>

The district court entered summary judgment for the United States (App. B, *infra*, 8a-13a). The court first noted that the Federal Tort Claims Act subjects the United States to liability only where a private person would be liable in "like circumstances" (*id.* at 10a), and it held that California law does not recognize a duty giving rise to liability in tort for inspection and certification activities (*id.* at 10a). The court further held that the FAA's inspection and certification responsibilities were regulatory functions, not operational services, and "[did] not give rise to an actionable duty in tort under California law" that extended to respondents (*ibid.*). Specifically, the court ruled that "the benefits of [the FAA's inspections] flow to the general public at large and not to any individual so as to render the United

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<sup>6</sup> The applicable regulation, CAA § 4b.381 and (d), provided (quoted in App. A, *infra*, 3a):

*Cabin Interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

\* \* \* \* \*

All receptacles for used towels, papers and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

No identical provision exists in the FAA's regulations, but they do require that each compartment to be used by the crew or passengers must be made of materials that are flame resistant. 14 C.F.R. 23.853.

States liable for negligence in their performance" (*id.* at 11a) and that the FAA's actions did not relieve respondent Varig of the primary responsibility for the safety of its airplane (*id.* at 12a).

Although the district court found no basis for imposing liability on the government based on any tort theory, it nevertheless held that respondents' claims were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h) (App. B, *infra*, 12a).

4. The court of appeals reversed (App. A, *infra*, 1a-7a). Employing reasoning similar to that adopted by the same panel in its opinion issued the same day in *United Scottish Insurance Co. v. United States*, 692 F.2d 1209 (9th Cir. 1982), the court held that the United States could be held liable under the good samaritan doctrine, as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965). In the court's view, the government had performed a "service" to respondents within the meaning of the doctrine because "the United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft" (App. A, *infra*, 5a). The court also concluded that the reliance element of the doctrine had been satisfied because, having issued regulations "designed to insure optimum safety," the government "should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify" (*ibid.*). The court made no mention of the significance, if any, of the fact that all of the passengers on the aircraft were foreign residents or that respondent Varig had never attempted to obtain an export certificate of airworthiness.

Relying in part on *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981), cert. granted, No. 81-1494 (May 24, 1982), the court of appeals ruled that the misrepresentation exception did not bar this action because "[re-

spondents'] claims \* \* \* arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate" (App. A, *infra*, 6a). Finally, the court of appeals rejected the discretionary function exception as a bar to this suit because "[t]he kind of discretion contemplated by the exemption clause does not exist in certifying compliance with F.A.A. safety regulations" (*id.* at 6a-7a).

Judge Chambers' concurring opinion in *United Scottish Insurance Co.* also applied to this case (692 F.2d at 1212). Judge Chambers observed that "[m]ost of us thought when the Federal Tort Claims Act was passed that the discretionary exception \* \* \* would preclude recovery on the facts of the two cases we decide today, but the developing law seems to have overtaken us."

#### REASONS FOR GRANTING THE PETITION

These two cases present important questions identical to those presented in our petition for a writ of certiorari in *United States v. United Scottish Insurance Co.*, No. 82- (filed Feb. 11, 1983).<sup>7</sup> All three cases were decided on identical grounds by the same panel of the Ninth Circuit on the same day. In each case the court of appeals held that the United States is liable under the Federal Tort Claims Act for injuries allegedly caused by the crash of airplanes inspected by FAA employees and negligently certified as airworthy. Obviously, the proper disposition of this petition is dependent on this Court's decision on our petition in *United Scottish Insurance*. Accordingly, this petition should be held pending disposition of the petition in that case.

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<sup>7</sup> We are providing counsel for respondents with a copy of our petition in *United Scottish Insurance*.

**CONCLUSION**

The petition for a writ of certiorari should be held pending disposition of the petition in *United States v. United Scottish Insurance Co.*, No. 82- (filed Feb. 11, 1983), and then disposed of as appropriate.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

FEBRUARY 1983

APPENDIX A  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 81-5366  
DC No. CV 76-0187-WPG

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S.A. EMPRESA DE VIACAO AEREA RIO CRANDENSE  
(VARIG AIRLINES), APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

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No. 81-5399  
DC CV 78-0914-WPG

EMMA ROSA MASCHER; ALFRED ROSA; GUIDO ROSA;  
RAYMOND ROSA; BRUNO ROSA; CORIDO ROSA; AND  
ERNEST ROSA, INDIVIDUALLY AND AS HEIRS AND  
LEGATEES OF ELIO ROSA, DECEASED, ET AL.,  
APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

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Filed October 26, 1982

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AMENDED OPINION

Appeal from the United States District Court  
for the Central District of California  
William P. Gray, District Judge, Presiding  
Argued and submitted June 10, 1982

BEFORE: CHAMBERS, GOODWIN and PREGERSON,  
Circuit Judges

GOODWIN, Circuit Judge

Plaintiffs sued the United States under the Federal  
Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, for the loss  
of a Boeing 707 aircraft that crash landed after a lavato-

ry unit caught fire.<sup>1</sup> The Federal Aviation Administration (F.A.A.) had certified that the lavatory unit complied with F.A.A. fire protection standards. Varig alleged that the unit did not comply. The trial court granted the United States summary judgment on the grounds that the certification did not come within California's good samaritan rule and that, even if it did, liability was precluded by the misrepresentation and discretionary function exception clauses of the Federal Tort Claims Act.

On July 11, 1973, Varig Airlines Flight 820, a non-stop flight from Rio de Janeiro to Paris, was a few minutes from its scheduled landing at Orly Airport near Paris. Although the flight had progressed without incident, a passenger who used the restroom reported smoke in a lavatory. Within four to six minutes, a fire in the aft lavatories caused thick, black smoke to fill the cabin and cockpit. Because of the smoke, the crew and passengers could not see the exits or each other; the pilots could not see each other or any of the instruments.

The pilots then opened the sliding windows of the cockpit and put their heads out in order to make a crash landing in a field near the airport. The plane crash landed six minutes after the smoke had first been discovered. Of a total of 135 persons on board, ten crew members and one passenger survived. The rest died from asphyxiation or the effects of toxic gases.

The aircraft had been manufactured fifteen years earlier by Boeing Aircraft and had been sold to Seaboard Airlines which subsequently resold the plane to Varig Airlines. Before Boeing manufactured the plane,

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<sup>1</sup> The individual plaintiffs are pursuing claims for the loss of life among the passengers. Varig's action against Boeing for damages for the loss of the aircraft was barred by the express waiver of tort liability contained in the original sales agreement of the aircraft in question and agreed to by Varig upon its purchase of the aircraft from an earlier buyer. See *S.A. Empresa, etc., v. Boeing Co.*, 641 F.2d 746 (9th Cir. 1981).



its designs, plans, specifications and performance data were inspected and certified as acceptable by the United States government.

Civil Air Regulation 4b.381(d) requires:

### FIRE PROTECTION

"§ 4b.381 *Cabin interiors*. All compartments occupied or used by the crew or passengers shall comply with the following provisions.

\* \* \* \* \*

"(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

For purposes of summary judgment, we assume that the lavatory sink unit on the 707 contained flammable material, lacked a cover, and had large holes which made the compartment incapable of containing smoke or fire.<sup>2</sup>

Under the Federal Torts Claims Act, the government may be liable in tort only if a private individual would have been liable under "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Here, the United States' inspection of the designs, plans, specifications and performance data of the 707 and certification of the plane all occurred in Los Angeles.

An individual inspecting and certifying aircraft design for safety in California would be judged by the rule set forth in Restatement (Second) Torts, §§ 323 and 324A. Therefore, the United States is to be judged under the same rule. *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (1979), affirmed this day following remand, No. 81-5062, (9th Cir. 1982).

<sup>2</sup> *S.A. Empresa, etc. v. Walter Kidde & Co., Inc.*, No. 79-3720, (February 26, 1982, as amended June 23, 1982 (9th Cir.).

Under the Restatement rule, a defendant may be liable if it negligently performed a service either for the injured party or to another for the protection of the injured party. *United Scottish Insurance Co., supra; Ingham v. Eastern Airlines*, 373 F.2d 227 (2d Cir. 1967). Under the Restatement, this negligently performed service must have either increased the risk of injury to the injured person or have caused him to rely on proper performance of the service.

The United States claims that it was not performing a service and that, in any case, its actions did not increase the risk of injury or cause reliance on their proper performance. The United States contends it was performing a regulatory duty rather than a service and that, unlike an air traffic controller, an F.A.A. inspector is not engaged in operational activities and, therefore, owes no duty to those dependent on his performance.

The government cites *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). Roberto Clemente was killed in the crash of a private plane in Puerto Rico. His widow sued the United States. She alleged that the F.A.A. was negligent in failing to inform the passengers that the plane was overweight and lacked a proper flight crew. Because only a local F.A.A. directive then required that "[c]lear indication of alleged illegal flight . . . be made known to flight crew and persons chartering the service," *id.* at 1143, n.3, and because there was no indication that anyone had ever relied upon the kind of warning the widow was asserting to be a governmental duty, the First Circuit held that there was no good Samaritan duty in the *Clemente* case.

In the instant case, Civil Air Regulation 4b.381(d) specifically requires waste receptacles to be made of fire-resistant material and to incorporate covers or other provisions for containing possible fires. A statute,

49 U.S.C. § 1421, requires that the F.A.A. conduct a comprehensive inspection for compliance with all safety regulations before a certificate of airworthiness will issue. Aircraft purchasers rely upon these inspections.

The United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft. The Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, requires the F.A.A. "to promote safety of flight of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation . . ." 49 U.S.C. § 1421. The Act provides for a mandatory certification procedure, 49 U.S.C. § 1423, and the F.A.A. has established design criteria that every aircraft must meet before being certified for flight.

Members of the flying public may not know the specific contents of F.A.A. regulations. There is general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under that state's good samaritan rule. It follows that the United States also falls within the rule. Even without reference to the good samaritan rule, we have indicated that an action against the government will lie in a negligent inspection and certification case. *Arney v. United States*, 479 F.2d 653, 661 (9th Cir. 1973).

The United States contends that if it comes under this rule it will be liable for every accident resulting from an activity subject to government safety regula-

tions. This argument is not persuasive. The United States will be liable only when injury has resulted from the negligent performance of its duty. The voluntary assumption of the inspection and certification function carries with it the duty to inspect and certify with reasonable care.

Under the Federal Tort Claims Act, the United States is not subject to liability for "[a]ny claim arising out of . . . misrepresentation . . ." 28 U.S.C. § 2680(h). The government contends that plaintiff's claims are actually actions for negligent misrepresentation.

Plaintiffs' claims, however, arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate. See *United Scottish Insurance Co. v. United States*, *supra*. The certification merely reports results of the negligent inspection. *Neal v. Bergland*, 646 F2d 1178, 1183-84 (7th Cir. 1981), *cert. granted*, 102 U.S. 2267 (1982); *In Re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384, 409 (D.Kan. 1977). Thus, the United States is not protected from liability by the misrepresentation exception.

The United States also argues that the discretionary function exception of the Federal Tort Claims Act precludes liability. The discretionary function exception exempts the United States from liability under the Federal Tort Claims Act for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ." 28 U.S.C. § 2680(a).

The discretionary function exemption was primarily intended to preclude tort claims arising from decisions by executives or administrators when such decisions require policy choices. *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953).

The kind of discretion contemplated by the exemption clause does not exist in certifying compliance with

F.A.A. safety regulations. A proper inspection will discover facts. The facts will show either compliance or noncompliance. Aircraft must comply with the regulations in order to be certified. The government conceded in a leading case on the discretionary function exemption, *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), that the exemption did not apply to lighthouse keepers, whose negligent inspection of lighthouse facilities caused a ship to run aground. The duties undertaken by F.A.A. inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the cabinet level secretaries in *Dalehite*. The United States is not protected from liability under the discretionary function exception to the Federal Tort Claims Act in this case.

Reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV-76-0187-WPG

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

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Civil Action No. CV-78-0914-WPG

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA,  
RAYMOND ROSA, BRUNO ROSA, CORIDO ROSA, AND  
ERNEST ROSA, INDIVIDUALLY AND AS HEIRS AND  
LEGATEES OF ELIO ROSA, DECEASED, ET AL.,  
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

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Filed March 6, 1981

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FINDINGS OF FACT

1. These actions arise out of the crash of a Boeing 707 aircraft on July 11, 1973, near Paris, France.
2. Plaintiffs bring these actions under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 *et seq.* for damages allegedly caused by negligence on the part of Defendant, United States of America in the inspection and certification of the original Boeing 707 aircraft.
3. Plaintiff, VARIG Airlines, is a large commercial Brazilian airline. VARIG seeks recovery for the hull

loss; no recovery is sought for personal injury, death or loss of other property.

4. Plaintiffs Mascher, *et al.*, are survivors of sixty-two passengers who died in the subject accident.

4. The subject Boeing 707 aircraft was designed, manufactured, tested, inspected and assembled by the Boeing Company.

6. The Defendant, United States of America, through the Civil Aeronautics Agency initially issued a type certificate for the Boeing 707 aircraft in 1958 in Los Angeles, California, pursuant to the submission of designs by the Boeing Company.

7. The subject aircraft was sold by the manufacturer, the Boeing Company, to Seaboard Airlines who subsequently sold the aircraft to VARIG Airlines.

8. The United States of America, through its employees or through a designated representative, inspected the designs, plans, specifications and performance data of the original Boeing 707 aircraft in 1958 before a type certificate was issued.

9. Prior to the accident, neither the Boeing Company, Seaboard Airlines or VARIG Airlines ever notified the United States of America that there were any deficiencies in any lavatory waste container.

10. The Defendant, United States of America, through its agents and employees did not perform any physical act to cause the fire aboard the subject aircraft.

11. The United States' inspection and certification of the aircraft were regulatory functions, not "operational" services like air traffic control.

23. [*Sic*] The United States of America, in performance of its regulatory functions in issuing a type certificate, did not undertake to insure the safety of the subject aircraft.



15. The United States of America did not design, assemble, manufacture, repair, alter, own or operate the subject aircraft at any time.

16. No act or omission of the United States of America, through its employees and agents, was a proximate cause on contributing [Sic] to the crash of the Boeing 707 aircraft.

17. There was no negligence on the part of the United States of America or any of its employees that was a proximate cause of this accident.

To the extent any findings of fact are found to be conclusions of law, the Court will deem them to be conclusions of law.

#### CONCLUSIONS OF LAW

1. This is a suit under the Federal Tort Claims Act and therefore the law of California, the place where the alleged acts or omissions occurred, is applicable. 28 U.S.C. § 1346(b). *Richards v. United States*, 369 U.S. 1 (1962); 28 U.S.C. §§ 1346(b), 2674.

2. Under the Federal Tort Claims Act, Courts may not determine governmental liability without considering the liability of a private person in "like circumstances." 28 U.S.C. § 1346(b); *Roberson v. United States*, 382 F.2d 714 (9th Cir. 1967); *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (9th Cir. 1979); *Blessing v. United States*, 447 F.Supp. 460 (E.D. Pa. 1978).

3. California law does not recognize an actionable tort duty in private persons or governmental agencies for inspection and certification activities. California Government Code § 818.6. *In Re Pago Pago Air Crash Disaster of Jan. 30, 1974*, MDL 176, U.S. Motion for Partial Summary Judgment (C.D. Calif. Jan. 6, 1978).

4. The FAA's inspection and certification of the Boeing 707 aircraft does not give rise to an actionable duty in tort under California law. California Government

Code § 818.6. *In Re Pago Pago Air Crash Disaster of Jan. 30, 1974*, MDL 176, U.S. Motion for Partial Summary Judgment (C.D. Calif., Jan. 6, 1978); *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (9th Cir. 1979).

5. Although FAA regulations establish safety standards and provide for inspection to assure compliance with such standards, the benefits of those governmental acts flow to the general public at large and not to any individual so as to render the United States liable for negligence in their performance. *Roberson v. United States*, 382 F.2d 714 (9th Cir. 1967); *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *People of State of Illinois v. Maryland Casualty*, 132 F.2d 830 (7th Cir. 1942).

6. The United States, by undertaking to "promote air safety" did not undertake a legal duty to Plaintiffs herein that is actionable in tort under the Federal Tort Claims Act. *Laird v. Nelms*, 406 U.S. 797 (1972); *Kirk v. United States*, 270 F.2d 110 (9th Cir. 1954); *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

7. The United States of America, by inspecting and certificating the Boeing 707 aircraft, did not undertake a "Good Samaritan" duty owed to Plaintiffs herein under California law. *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979); *Wright v. Arcade School District*, 230 CA 2d 272 (1964); *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

8. The Federal Aviation Act of 1958 does not impose an actionable tort duty upon the FAA's inspection and enforcement personnel: *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Rogers v. Ray Gardiner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

9. The United States of America owed no duty in regard to its inspection and certification of the aircraft under the Federal Aviation Act, the Federal Tort Claims Act, California law or common law to Plaintiffs herein. *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Harmsen v. Smith*, 586 F.2d 156 (9th Cir. 1978); *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979).

10. By conducting the inspection of the aircraft, the United States of America did not relieve VARIG, the owner and operator of the aircraft of its primary responsibility for the safe operation of the aircraft. *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (9th Cir. 1979); *Mercer v. United States*, 460 F.Supp. 329 (S.D. Ohio 1978); 14 C.F.R. § 91.3.

11. Plaintiffs' allegations of the United States' failure to ensure that the Boeing Company complied with the applicable regulations is jurisdictionally barred by the discretionary function exception to the Federal Tort Claims Act. 28 U.S.C. § 2680(a); *Dalehite v. United States*, 346 U.S. 15 (1953); *In Re Franklin National Bank*, 478 F.Supp. 210 (E.D. N.Y. 1979); *Maynard v. United States*, 430 F.2d 1264 (9th Cir. 1970).

12. Plaintiffs' allegations of negligent inspection and testing, failure to warn, failure to issue airworthiness directives and failure to issue adequate minimum standards are jurisdictionally barred by the discretionary function and the misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h). *Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. Neustadt*, 366 U.S. 696 (1961); *Marival, Inc. v. Planes, Inc.*, 306 F.Supp. 855 (N.D. Ga. 1969).

13. Plaintiffs' allegations of negligent issuance of a type certificate to the Boeing 707 aircraft are jurisdictionally barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h). *Lloyd v. Cessna Air-*

*craft Co.*, 429 F.Supp. 181 (E.D. Tenn. 1977); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954); *Dalehite v. United States*, 346 U.S. 15 (1953).

14. Even when the United States' misrepresentation is an implied but false assurance to the public that it will abide by its own rules and regulations, the claim is barred by the misrepresentation exception. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975); *cert. denied*, 425 U.S. 910 (1975).

15. The FAA, by its inspection and issuance of a Type Certificate, did not undertake to warrant or guarantee the safety of the subject aircraft. *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979); *Marival, Inc. v. Planes, Inc.*, 306 F.Supp. 855 (N.D. Ga. 1969).

16. The duties of the FAA inspectors in the inspection and certification of the Boeing 707 aircraft were not "operational" duties like air traffic control services and therefore no duty is created under the "Good Samaritan" doctrine. *United Scottish Ins. Co. v. United States*, 614 F.2d 188 (9th Cir. 1979); *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977); *cert. denied*, 435 U.S. 1006 (1978).

17. No triable issue of fact exists for the purposes of the United States' Motion for Summary Judgment.

18. Summary judgment will be granted in favor of the Defendant, United States of America.

To the extent that any conclusions of law are found to be findings of fact, the Court will deem them to be findings of fact.

WHEREFORE, Defendant, United States of America, is entitled to summary judgment against Plaintiffs herein on the issue of liability as a matter of law.

DATED this 6 day of March, 1980.

/s/ WILLIAM P. GRAY

*United States District Judge*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV-76-0187-WPG

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

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Civil Action No. CV-78-0914-WPG

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA,  
RAYMOND ROSA, BRUNO ROSA, CORIDO ROSA, AND  
ERNEST ROSA, INDIVIDUALLY AND AS HEIRS AND  
LEGATEES OF ELIO ROSA, DECEASED, ET AL.,  
PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

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Filed March 6, 1981

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ORDER FOR ENTRY OF SUMMARY JUDGMENT  
IN FAVOR OF DEFENDANT, UNITED STATES OF  
AMERICA AND AGAINST PLAINTIFFS VARIG AND  
MASCHER, *ET AL*

The Motion of Defendant, United States of America, for an Order for Entry of Summary Judgment in Favor of Defendant, United States of America, was regularly heard on January 26, 1981. All parties were represented by counsel. After full consideration of the moving and responding papers, all supporting papers and oral argument of counsel, it appears and the Court finds that Defendant, United States of America, has shown

by admissible evidence and reasonable inferences from the evidence that the action has no merit as against Defendant, United States of America, and Plaintiffs, VARIG Airlines and Mascher, *et al*, have presented no triable issue of fact.

IT IS ORDERED that judgment be entered in accordance with this Order in favor of the United States of America and against the Plaintiffs herein as prayed for in the answers.

DATED: March 6, 1981

/s/ WILLIAM P. GRAY

*United States District Judge*

APPENDIX D  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NO. 81-5366  
DC CV 76-0187 WPG

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL from the United States District Court for  
the Central District of California

THIS CAUSE came on to be heard on the Transcript of  
the Record from the United States District Court for  
the Central District of California and was duly  
submitted.

ON CONSIDERATION WHEREOF, It is now here or-  
dered and adjudged by this Court, that the judgment of  
the said District Court in this Cause be, and hereby is  
reversed and remanded.

Filed and entered October 8, 1982



APPENDIX E

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 81-5399  
DC CV 78-914 WPG

EMMA ROSA MASCHER; ALFRED ROSA; GUIDO ROSA;  
RAYMOND ROSA; BRUNO ROSA; CORIDO ROSA; AND  
ERNEST ROSA, INDIVIDUALLY AND AS HEIRS AND  
LEGATEES OF ELIO ROSA, DECEASED, ET AL.,  
PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

APPEAL from the United States District Court for  
the Central District of California

THIS CAUSE came on to be heard on the Transcript of  
the Record from the United States District Court for  
the Central District of California and was duly  
submitted.

ON CONSIDERATION WHEREOF, It is now here or-  
dered and adjudged by this Court, that the judgment of  
the said District Court in this Cause be, and hereby is  
reversed and remanded.

Filed and entered October 26, 1982

## APPENDIX F

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA, RAYMOND ROSA, BRUNO ROSA, CORIDO ROSA, and ERNEST ROSA, individually and as heirs and legatees of ELIO ROSA, deceased; HONOR CHRISTINE BROGAN, individually and as next friend of THOMAS JAMES PATRICK BROGAN, a minor, and both as heirs of DIARMUID JOHN BROGAN, deceased; CLAUDE MARIE-JOSEPHE ARNAUD LAVAUD, individually and as next friend of SOPHIE CLAUDE MARIE LAVAUD, and PHILIPPE JEAN MARIE LAVAUD, minors, and BRIGITTE LAVAUD PASTEYER, individually, CATHERINE CHRISTINANE ELISABETH LAVAUD, individually, and FRANCOIS JEROME GABRIEL LAVAUD, individually, and all as heirs of YVON ANDRE JEROME LOUIS LAVAUD, deceased, MANDANJEET SINGH and SUMITRA SINGH, co-executors of the estate of RANJEETA PRITHI SINGH, as heir of KUMARI REETA PRITHI SINGH, deceased; BARATELLA DIRCE DAINELLI, ALBERTINA DAINELLI, UGO DAINELLI, ORNELLA DAINELLI ALLEGRI, REGINA DAINELLI PISANO, individually and as heirs of LORENZO DAINELLI, deceased; ZELIA RIVETTO GRIGLIO and SERGIO GRIGLIO, individually and as heirs of LUIGI GRIGLIO, deceased; FRANCESCA GRIGLIO BONGIOVANNI, FERNANDA BONGIOVANNI, and ALBERTO BONGIOVANNI, individually and as heirs of GUISEPPE BONGIOVANNI, deceased; UBALDO GAETANO ZANARDI, individually and as heir and legatee of YOLE ZANARDI ROSA, deceased; MARIA LUCIA BRUDER, individually and as next friend of THOMAS BRUDER and GEORGIA BRUDER, minors, and all as heirs of JOERG BRUDER, deceased; HALIM

AIDAR JR., individually and as personal representative of HALIM AIDAR and LEILA RAHAL BERRIEL AIDAR, deceased, and CRISTINA BERRIEL AIDAR and CLAUDIA BERRIEL AIDAR, individually, and all as heirs of HALIM AIDAR and LEILA RAHAL BERRIEL AIDAR, deceased; ANA LUCIA TEIXEIRA DE ANDRADE FIGUEIRA, individually and as heir of JOAO PAULO DE ANDRADE FIGUEIRA and FLORISBELA TEIXEIRA DA SILVA DE ANDRADE FIGUEIRA, deceased; ZULMIRA DE CUNHA HONEM DE MELO, AMALIA DA CUNHA E OLIVEIRA, TEREZA CUNHA DE SOUZA ANDRADE, ALEXANDRIANA DE OLIVIERA DALMASO, ELIO AFONSO DA CUNA, SELENE DA CUNHA MORAES, EROS AFONSO DA CUNHA, TEREZINHA AFONSO DA CUNHA, and ANTONIO AFONSO DA CUNHA, individually and as heirs of MARIA DA CUNHA E. OLIVEIRA, deceased; GENI NILSA DIEFENTHALER, IGNES DIEFENTHALER, CARLA DIEFENTHALER, AGNES DIEFENTHALER and MARCOS DIEFENTHALER, all as heirs of CARLOS DIEFENTHALER NETO, deceased; MARIENNE CHABERAT MAS, CHRISTIAN MAS, and JOELLE MAS GROS, individually and as heirs of PIERRE MAS, deceased; ANNA OLENE GUNBORG HENRIETTA BERNSTROM FAUCONNIER, individually and as next friend of PETER ELIE FREDERICK FAUCONNIER and MATHIAS ALEXIS YVON FAUCONNIER, minors and all as heirs of JEAN ELIE ROGER FAUCONNIER, deceased; PIERRE JEAN FRANCOIS SARDA, MICHEL FRANCIS JEAN SARDA, ALAIN JEAN JACQUES SARDA, and NICOLE MARIE LAURENCE SARDA DE CLAVIERE D'HUST, individually and as heirs of FRANCOIS SARDA, deceased; MADDY MARIE

GABRIELLE ROSEANE DIETRICH AUFRERE DE LA PREUGNE, SOLANGE AUFRERE DE LA PREUGNE, ISABELLE AUFRERE DE LA PREUGNE, and ANNE MARIE AUFRERE DE LA PREUGNE, individually and as heirs of BERNARD FELIX MARIE ANTOINE AUFRERE DE LA PREUGNE, deceased; LUCIENNE DANDO TARDIF, GERARD TARDIF, and CLAIRE TARDIF MARETTE, individually and as heirs of ROBERT TARDIF, deceased; JACQUELINE DUBOIS FARDEL, individually and as next friend of DORIS-MARIE FARDEL, a minor, and NICOLE-SUZANNE FARDEL, individually and all as heirs of JACQUES FARDEL, deceased; DANIELLE YVONNE COJAN GHORBANIAN, individually and as next friend of PASCAL KARIM GHORBANIAN and PHILIPPE GUIVE GHORBANIAN, minors, and all as heirs of JALIL GHORBANIAN, deceased; MARIE SIEBERTSCHIRKY, VALENTIN SIEBER, HEDWIG GRAF-SIEBER, and ROSE-MARIE SIEBER, individually and as heirs of JOHANN JAKOB SIEBER, deceased; MARIA NEUSA CONSONI GUIMARAES, individually and as next friend of ANA LUIZA CONSONI GUIMARAES, SILVIA CONSONI GUIMARAES, and LUIZ HUMERTO CONSONI GUIMARAES, minors, and ELZA HELENA CONSONI GUIMARES, and CRISTINA CONSONI GUIMARAES, individually, and all as heirs of LUIZ HUMBERTO CUNHA GUIMARES, deceased; CHARLOTTE AUGUSTE LUISE PRANGE DANZBERG, individually and as heir of HANELORE DANZBERG, deceased; EGON ERNY KIRST and NELLY EBLING KIRST, individually and as heirs of GASTON RONALDO KIRST, deceased; MARIA REGINATO PAGANELLA, individually and as heir of NIVALDO PAGANELLA KIRST, deceased; CLARA ZIMMERMAN DE PELUFFO, individually and as

next friend of SANTIAGO PELUFFO, VERONICA PELUFFO, RODRIGO PELUFFO, AGUSTINA PELUFFO, and JOSEFINA PELUFFO, minors, and all as heirs of HORACIO RODRIGO PELUFFO, deceased; ENILDA FERNANDEZ DE SORTINO, individually and as heir of VICTOR HUGO FERNANDEZ, deceased; SUZANNE MARIE-LOUISE SEVE JACQUIOT, individually and as next friend of DENIS ROLAND JACQUIOT and CHARLOTTE JACQUIOT, minors, and CHRISTOPHE LUC MARC JACQUOIT, individually, and all as heirs of NOEL MARIUS JACQUIOT, deceased; FELIX RENATO GUTIERREZ ACUNA and MARIA MERCEDES GUITIERREZ ACUNA, individually and as heirs of ELVIRA ACUNA RIQUELME, deceased; MARIA LUIZA PEREIRA DE ALMEIDA LEITE RIBIERO, individually, PATRICIA LEITE RIBIERO, individually, and MARIA FERNANDA LEITE RIBIERO, individually, and all as heirs of CELSO LEITE RIBIERO FILHO, deceased; MARINA MENEZES DE OLIVEIRA CARVALHO, individually and as next friend of SERGIO MENEZES DE OLIVERIA CARVALHO, a minor, and all as heirs of PLINIO JOSE DE CARVALHO FILHO and ISABELLA MENEZES DE OLIVEIRA CARVALHO, deceased; MAGDALENA JUANA JULIA BAPAUME DE FOVILLE DE AUGE, ENRIQUE BERNARDO AUGE, and JUAN CLAUDIO AUGE, individually and as heirs of ALBERTO NORBERTO AUGE, deceased; MYRIAM COLLIER DE LAMARE, GUILHERME COLLIER DE LAMARE and CLAUDIA COLLIER DE LAMARE, individually and as heirs of JULIO BARBOSA DE LAMARE, deceased; JOSE NARCISO DA FONSECA E SILVA and ISIS SOUZA DA FONSECA E SILVA, individually and as heirs of JOSE NARCISO DA FONSECA E SILVA, deceased; GERALDO GUOVEA CAR-

RAZEDO and CELINA CORREA CARRAZEDO, individually and as heirs of SOLANGE CARRAZEDO DA FONSECA E SILVA, deceased; CLAUDIA DE SOUZA WEISS, individually and as next friend of FABIA DE SOUZA SCAVONE, a minor, and both as heirs of ANTONIO CARLOS SCAVONE, deceased, and DAYSE PULICE, as next friend of ALEXEI SCAVONE, a minor and heir of ANTONIO CARLOS SCAVONE, deceased; WALKIRIA TOLEZANO DI VIZIO, individually and as next friend of EDUARDO DI VIZIO, minor, and CLAUDIA TOLEZANO DI VIZIO and SILVANA DI VIZIO, individually, and all as heirs of EGIDIO DI VIZIO, deceased; PAULINA ZILBERMAN KNIJNIK, individually and as heir of ELIZETE KNIJNIK, deceased; AMALIA VERON YGLESIAS, individually and as next friend of RAUL YGLESIAS and ELIS APARECIDA YGLESIAS, minors, and all as heirs of JUAN CARLOS YGLESIAS, deceased; MOISE JEAN-PAUL DAURIER, LOUIS DAURIER, JEANNE DAURIER, ANDRE DAURIER, ALBERT DAURIER, GEORGES DAURIER, VICTOR DAURIER, MARIE DAURIER, YVETTE DAURIER MEYER, HELENE DAURIER BARNAUD, and PAULETTE DAURIER HARO, individually and as heirs of SIMONE DAURIER BODITCH, ANNE MARIE BODITCH, and JEANINE EVELYNE BODITCH, deceased; HILDEGARD SEVERIN JUESTEN, DR. ULRICH JUESTEN, and DR. WOLFGANG JUESTEN, individually and as heirs of KURT FRIEDRICH OTTO JUESTEN, deceased; NANCY PALLETA DOS SANTOS, individually and as next friend of AIRTON PALLETA DOS SANTOS, a minor, and AUGUSTINHO DOS SANTOS JUNIOR, individually, and all as heirs of AUGUSTINHO DOS SANTOS, deceased; LUCIANA ROSANGELA MERLO in ZAVARONI, individually and as next friend of

FRANCESCA ZAVARONI, a minor, and as heirs of LUCIANO ZAVARONI, deceased; MONIKA COLLI, individually and as next friend of SVEN COLLI and TANJA COLLI, minors, and all as heirs of PETER COLLI, deceased; FRANCISCA ARLITA BARBOSA QUINDERE, individually and as next friend of RENATA BARBOSA QUINDERE and ADRIANA BARBOSA QUINDERE, minors, and CRISTINA BARBOSA QUINDERE, individually, LUCINA BARBOSA QUINDERE, individually, and PAULO BARBOSA QUINDERE, individually, and all as heirs of CLAYRTON LUIZ GARCIA QUINDERE, deceased; CORNELIA KOEMAN-NIEUWEBOER, KLAAS EVERT KOEMAN, MAARTJE GRIETJE KOEMAN and MARTIN DIK KOEMAN, individually and as heirs of MEINDERT KOEMAN, deceased; LUIZ TIELLET, RIVADAVIA TIELLET, ARISTOTELINO TIELLET, ELOAH TIELLET DA SILVA, LUIZA DE LOURDES TIELLET OLIVIERA, HILDA ALVARES, CELANIRA TIELLET BORGES, and THEREZINHA TIELLET BUENO, individually and as heirs of WILSON MIORIM TIELLET, ANTONIO AUGUSTO TIELLET and JULIO MARIO TIELLET, deceased; DOLORES VELLOSO VIANNA, individually and as heir of MARINA VIANNA TIELLET, ANTONIO AUGUSTO TIELLET, and JULIO MARIO TIELLET, deceased; WALDEMAR MARTINS FERREIRA FILHO, ANNA MARIA MARTINS FERREIRA, MARIA ANTONIETA MARTINS FERREIRA, and WALDEMAR FERREIRA NETTO, individually and all as heirs of ANNA MARIA MALTA CARDOZO MARTINS FERREIRA, deceased; MARIA ISABEL MALTA CARDOZO BARRETTO PRADO, EVANGELINA MALTA CARDOZO JUNQUEIRA DE AQUINO, CARLOTA JOSEPHINA MALTA CARDOZO DOS REIS BOTO,



FRANCISCO MALTA CARDOZO NETO, ANNA MARIA MARTINS FERREIRA, MARIA ANTONIETA MARTINS FERREIRA, WALDEMAR FERREIRA NETO, individually and all as heirs of FRANCISCO MALTA CARDOZO and EVANGELINA SAMPAIO VIDAL MALTA CARDOZO, deceased.

APR 15 1983

ALEXANDER L. STEVAS,  
CLERK

No. 82-1349

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,  
v. *Petitioner,*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES),  
*Respondent.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

EMMA ROSA MASCHER, et al.,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

**BRIEF OF RESPONDENT VARIG AIRLINES  
IN OPPOSITION TO PETITION FOR CERTIORARI**

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*Counsel of Record*  
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(202) 822-1000  
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Varig Airlines*

April 15, 1983

## QUESTIONS PRESENTED

1. Whether the United States can be held liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, for the negligence of Federal Aviation Administration ("FAA") employees in inspecting the design of a commercial transport category aircraft \* for type certification purposes which did not comply with the Federal Aviation Regulations ("FARs"), where a private person in similar circumstances would be held liable under the "Good Samaritan" doctrine of the applicable state law.

2. Whether the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars claims based on the FAA's negligent inspection for type certification purposes of commercial transport category aircraft, where the FAA inspectors approved an aircraft design which did not comply with detailed, mandatory FAA safety regulations, and the noncompliance was both obvious and substantial.

3. Whether the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars claims based on the FAA's negligent inspection for type certification purposes of the design of commercial transport category aircraft.

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\* "Transport category" aircraft are those certificated in accordance with 14 C.F.R. Part 25 and include all large aircraft weighing over 12,500 lbs.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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No. 82-1349

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UNITED STATES OF AMERICA,  
v. *Petitioner,*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES),  
*Respondent.*

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UNITED STATES OF AMERICA,  
v. *Petitioner,*

EMMA ROSA MASCHER, *et al.*,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**BRIEF OF RESPONDENT VARIG AIRLINES  
IN OPPOSITION TO PETITION FOR CERTIORARI**

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Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in opposition to the petition for a writ of certiorari filed by the United States of America.<sup>1</sup>

**STATEMENT OF THE CASE**

The government's petition gives only a brief outline of the facts that gave rise to this case. See Petition for Cer-

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<sup>1</sup> VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

tiorari at 2-6.<sup>2</sup> Since the issues presented here are heavily fact-dependent, VARIG believes that a fuller discussion of the considerable evidence in the record below is essential to a proper disposition of this case.

### A. Facts of the Crash

On July 11, 1973, VARIG's Flight 820 took off from Rio de Janeiro for a scheduled eleven-hour nonstop flight to Paris.<sup>3</sup> The aircraft was one of VARIG's 707 jet aircraft manufactured by Boeing. The flight progressed without incident until a few minutes before landing at Orly Airport, when a passenger exited from the aft lavatory of the aircraft and reported smoke to the flight attendants. Within the space of four to six minutes, an in-flight fire on board the aircraft in the aft lavatories reached such intensity that it caused thick, black smoke to roll forward from the extreme aft section of the aircraft through both passenger cabins into the cockpit. Within moments, the smoke was so dense that cabin crew members could not see the exit windows or the passengers, and the pilots could neither see each other nor any of their flight instruments. As a result, the pilots opened the sliding windows in the cockpit and stuck their heads out into the windstream in order to make a crash landing into a field just a few miles from Orly Airport.

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<sup>2</sup> The government's petition in this case largely incorporates by reference its petition in *United States v. United Scottish Insurance Co.*, No. 82-1350, which involves the same issues as the present case. The petition in this case will be referred to hereinafter as "Pet." The petition in *United Scottish* will be referred to as "*United Scottish Pet.*"

<sup>3</sup> Because the aircraft crashed in France, the official accident investigation came under the jurisdiction of a French Commission of Inquiry. Rudolf Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board, was assigned to the French Commission as the Accredited Representative of the United States. Mr. Kapustin's deposition testimony and the exhibits introduced during his deposition, including the Final Report of the French Commission, establish the facts set forth in the text concerning the crash.

When the plane came to a stop in the field only six minutes after the smoke was first discovered, most of the people in the plane were unconscious or dead from asphyxiation or toxic gases. Seven crew members and one hundred seventeen passengers—a total of 124 persons—died in the crash. The aircraft—valued at six million dollars—was totally destroyed.

#### **B. Accident Investigation and Probable Cause of the Crash**

The official accident investigation was conducted by the French Commission of Inquiry with the assistance of Mr. Kapustin, who took part in preparing the Commission's official Final "Probable Cause" Report, which was issued on April 6, 1976. (Kapustin deposition, Exhibits 30, 31). This Final Report concludes that "[t]he probable cause of the accident is a fire which appears to have broken out in the sink unit of the rear starboard lavatory. . . . The fire could have been caused by either an electrical incident or by passenger carelessness." Mr. Kapustin testified that he agreed with this "probable cause" conclusion, and with the view that the fire probably started in the towel disposal area located in the sink unit of the aft lavatory. (Kapustin deposition, at 1204-06). In the district court the government admitted for purposes of its summary judgment motion that "the fire did originate in the lavatory waste container."<sup>4</sup>

As part of the accident investigation, Mr. Kapustin observed VARIG's voluntary teardown of the aft lavatories of an identical "sister ship" to the 707 that crashed. (Kapustin deposition, at 698-875). According to Mr. Kapustin's testimony, passengers deposit waste towels and other papers through a spring-loaded door beneath the sink in the lavatory. These waste towels do not fall into an enclosed metal container under the sink. Instead,

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<sup>4</sup> United States' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, at 6.

they fall into an open area located under the sink and behind a service door.

As the teardown of the sister ship's lavatory progressed, the investigators could see that the sink and cabinet module is installed into the aircraft as a single unit. When the investigators removed the sink and cabinet module from the aircraft bulkhead and observed the back of the unit, there were several large holes in it. (Kapustin deposition, at 904-16).

As part of the investigation, Mr. Kapustin attempted to determine whether the design of the lavatory sink unit complied with the FAA's Federal Aviation Regulations ("FARs") and their predecessors, the Civil Air Regulations ("CARs"). For present purposes, the most critical regulation is CAR 4b.381(d), which was identified by Mr. Kapustin as being in effect at the time the Boeing 707 was certificated by the FAA. (Kapustin deposition, at 715-18 and Exhibit 22.8). CAR 4b.381(d) provides in pertinent part as follows:

#### FIRE PROTECTION

§ 4b.381 *Cabin interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

. . . .

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

Mr. Kapustin testified in unequivocal terms that the towel disposal area in the 707 lavatory sink unit did *not* comply with CAR 4b.381(d):

Q. [By Mr. Bostwick] Directing your attention to Exhibit 22.8, which is the section 4b.381(d). . . . I would like to ask you in what regard did the aft lavatory trash container area of the 707's, such as operated by VARIG, fail to comply with that section, in your opinion?

. . . .

A. [By Mr. Kapustin] Well, sir, the compartment, as such, did not, first of all, contain any—it *was not a container*. It was strictly a compartment into which the wastepaper material was allowed to fall when it was introduced by the flapper door that's up on top of the module.

Number 2, *the area, in itself*, if this were to be a container, *contained flammable material*, such as the plastic tubing for the water drains, the door, the large door, was of a wood composition material, which although it could have been fire-resistant, to a degree, contained fabric, trim, which was not.

*The entire compartment has large holes in it. These holes, even though they wore a cover which was air-tight, would have made the entire compartment non air-tight and completely incapable of containing any fire or smoke.*

Q. Mr. Kapustin, in connection with the words in that regulation that refer to receptacles, "and shall incorporate covers or other provisions for containing possible fires," did you reach a conclusion as to whether or not this trash container area incorporated such a cover, or other provisions, that's referred to in that regulation.

A. Yes, sir.

Q. What was your conclusion in that regard?

A. *That there is no cover*. There's a flapper door, that was opened to put the wastepaper into the container, *but there was no cover, as such*.

(Kapustin deposition, at 1065, 1069-72, emphasis added).

Later in his deposition, Mr. Kapustin reiterated his view that the lavatory sink unit "was not capable of containing fire or smoke"; that "[i]t was a simple open and shut situation, that the compartment did not meet the requirements"; and that "the compartment was full of holes and air spaces, and simply could not, *by any stretch of the imagination*, be considered capable of containing a

fire if a fire were to occur in that compartment." (Kapustin deposition, at 1597, 1625, emphasis added).

As a result of Mr. Kapustin's investigation the NTSB issued certain "Safety Recommendations,"<sup>5</sup> which included a recommendation to the FAA that it "reevaluate certification compliance with section 4b.381(d) of the Civil Air Regulations on Boeing 707 series aircraft." (Kapustin deposition, Exhibit 22.17). The FAA, which is required by statute<sup>6</sup> to respond to the NTSB's Safety Recommendations, conducted an investigation into the compliance of the Boeing 707 with applicable federal regulations, including CAR 4b.381(d). This investigation was conducted by Richard Nelson, an FAA airworthiness engineer, who went to Brazil to participate in the tear-down of PP-VJZ's sister ship. In general, Mr. Nelson agreed with Mr. Kapustin's findings. Specifically, Mr. Nelson concluded that with respect to CAR 4b.381(d), the towel disposal area "appeared unsatisfactory from the fire containment standpoint," and that "it was not clear how the waste containers could possibly contain fire, as required by CAR 4b.381(d) . . . ." (Nelson deposition, at 351-54 and Exhibit 26). Following Mr. Nelson's investigation the FAA responded to the NTSB's Safety Recommendations, reporting that, with regard to the 707 waste paper containers, it had discovered "some deficiencies associated with the [fire] containment provisions" of CAR 4b.381(d).<sup>7</sup>

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<sup>5</sup> NTSB Safety Recommendations A-73-67 through 70, dated Sept. 5, 1973.

<sup>6</sup> See 49 U.S.C. §§ 1903, 1906.

<sup>7</sup> As a result of the investigation, the FAA issued two mandatory Airworthiness Directives requiring installation of ash trays and "No Smoking" signs in 707 lavatories and requiring compliance with a Boeing Service Bulletin providing for sealing or covering the gaps and holes in the sink unit. The rationale for the Airworthiness Directives was that the sink unit was incapable of containing fire and that it was possible for fires originating there to "develop into uncontrollable cabin fires leading to aircraft destruction and loss of life." (Kapustin deposition, Exhibits 21.1, 21.3).

### C. Certification of the Boeing 707

The Boeing 707 type aircraft was certificated under the Federal Aviation Act of 1958, 49 U.S.C. § 1301-1542, which requires the FAA "to promote safety of flight of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . . ." 49 U.S.C. § 1421.<sup>8</sup> In order to achieve these safety goals, the Act establishes a mandatory certification procedure. Manufacturers who wish to produce commercial aircraft must obtain from the FAA a Type Certificate for the aircraft. 49 U.S.C. § 1423(a)(2). A Type Certificate is issued if the aircraft meets the minimum design criteria specified in the detailed safety regulations promulgated by the FAA. *See* 14 C.F.R. Parts 21 & 25. An Airworthiness Certificate must also be obtained for each aircraft manufactured pursuant to a Type Certificate. The Airworthiness Certificate is issued if the particular aircraft conforms to the design specified in the Type Certificate and is otherwise in condition for safe operation. 49 U.S.C. § 1423(c); 14 C.F.R. § 21.171-21.199.<sup>9</sup>

The certification process begins when the manufacturer submits an application for a Type Certificate. The applicant provides FAA engineers with detailed plans, data

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<sup>8</sup> VARIG's accident aircraft was one of the Model 707-300C series of aircraft, for which the Type Certificate was issued in 1963. (Excerpt of Record in the court of appeals, at 275). However, some of the review work upon which the Type Certificate is based was performed before 1958 pursuant to the predecessor of the 1958 Federal Aviation Act, the Civil Aeronautics Act of 1938, 52 Stat. 973. For purposes of this petition, there is no significant difference between the policies and procedures of the 1938 Act and the 1958 Act.

<sup>9</sup> Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, testified at his deposition that the principal purpose of the entire aircraft certification process is to promote aviation safety and that "the principal beneficiaries of that certification process were the passengers and the operators of the airplanes that" the FAA certificated. (Lippis deposition, at 181-82).



and documentation showing what it proposes to build and how it intends to demonstrate compliance with FAA regulations. (Lippis deposition, at 30-31). The FAA engineers then "sift through" the documentation to verify that there has been compliance with each applicable regulation. (Nelson deposition, at 410-11, 413; Lippis deposition, at 39, 46, 55-56, 65, 135). After the applicant's data has been analyzed and the aircraft constructed, an FAA employee, called a "manufacturing inspector," must also inspect the aircraft in a "conformity inspection" to determine if detail design features, such as lavatory trash containers, comply with the approved design and with the applicable regulation. (Nelson deposition, at 449-51).

The FAA engineers performing the certification inspections and design reviews may not disregard any applicable regulations, nor do they have authority to conclude that compliance with a particular regulation is unnecessary. Their function is simply to compare the design with the regulations and to determine whether the design meets the minimum regulatory requirements. If it does not, the FAA inspectors have no discretion to accept the design notwithstanding the deficiency. Rather, the Type Certificate *must* be withheld until the manufacturer submits a design modification or other means of correcting the deficiency.

The role of FAA inspectors in the certification process was discussed at length in the depositions of FAA employees Richard Nelson and Rocco Lippis. For example, Mr. Nelson confirmed that CAR 4b.381(d) is clear and that an aircraft cannot be certificated if it does not comply with that regulation. Mr. Nelson testified:

Q. [By Mr. Lenhart, counsel for VARIG] And to the extent that those trash containers would not contain fire as a result of those holes, they would not be in compliance with 4b.381(d)?

.....

A. THE WITNESS [Mr. Nelson]: I don't know that I understand the question that well, but *the container either does or doesn't contain the fire. There is no in between.*

Q. And if it doesn't contain fire, then it doesn't comply with 4b.381(d) in your view?

A. Yes . . . .  
. . . .

Q. But to be type certificated, the lavatories on an aircraft *must* comply with that regulation?

A. Yes.

(Nelson deposition, at 149-50, emphasis added).

Similarly, Mr. Lippis testified that FAA regulations are "mandatory on . . . the certificating engineer" and "must be complied with." (Lippis deposition, at 132-33). The FAA engineers are charged with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*)

In the present case, the evidence is to the effect that the FAA *never* inspected or reviewed the design of the 707 lavatory trash container to verify compliance with CAR 4b.381(d). As part of his post-accident investigation, Richard Nelson searched the FAA's records in an attempt to find evidence that the waste container had been inspected for compliance with CAR 4b.381(d). He was unable to find any such evidence. (Nelson deposition, at 139-42). During discovery in the district court, the government was likewise unable to produce any evidence that the 707 lavatory waste container was ever actually inspected, despite repeated requests for such evidence by VARIG.

VARIG sought from the United States the identity of the person who inspected the 707 lavatory waste containers. The United States provided the names of several people who "might" have been involved in the inspection. VARIG took the depositions of FAA employees Jack Bulmer, Rocco Lippis and Harold Tanke; but none of the witnesses had inspected the trash container, and none could provide any evidence that someone else had performed the inspection. VARIG also made repeated requests to the United States for any documents showing that the 707 waste containers had been inspected. The only evidence produced by the government was two documents. One was a letter from former FAA employee W. A. Klikoff to Boeing stating that "final approval of the various interior arrangements [on the 707 model] will be dependent upon our inspection of the completed airplane." The other document was entitled "Check List Interior Arrangement" and was to be filled out by an FAA employee, now deceased, W. B. Spelman. One of the items listed was "CAR 4b.381(d) CHECK FOR: Fire resistant, covered waste containers." (Excerpt of Record in the court of appeals, at 242). The check list was never filled out by Mr. Spelman; and there was no indication that he, or anyone else, actually checked the lavatory trash containers prior to type certification. (Curtiss deposition, at 156).

Thus, although compliance with all FAA regulations is admittedly "mandatory" and "essential," it appears that the FAA never checked to determine whether the lavatories in the 707 aircraft complied with CAR 4b.381 (d), until *after* the VARIG crash had destroyed a 707 aircraft and killed 124 people.

#### **D. Disposition in the Courts Below**

VARIG commenced this action in the district court seven and one-half years ago, on January 16, 1976, seeking to recover six million dollars for the total destruction of its 707 jet aircraft. VARIG's complaint stated a claim against the government under California's Good Samari-

tan doctrine. VARIG alleged that the government had undertaken to inspect and issue Type Certificates for commercial aircraft; that VARIG relied upon the undertaking; that the government had negligently performed its undertaking with respect to the Boeing 707; that the FAA had negligently issued a Type Certificate for the Boeing 707 when it knew or should have known that its design did not comply with the applicable FARs; that this negligence increased the risk of harm to users and operators of 707s and that it proximately caused the destruction of VARIG's aircraft.<sup>10</sup>

On October 31, 1980, the government moved for summary judgment, arguing that VARIG's First Amended Complaint should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680 (a), 2680 (h). No supporting affidavits were filed with the motion and no admissible evidence was ever offered by the government to contradict the allegations in VARIG's complaint. In opposition to the motion, VARIG submitted, among other things, the affidavit of its Manager of Engineering and Maintenance Base, Frederico J. Ritter. With regard to VARIG's allegations of reliance Mr. Ritter stated:

When a manufacturer like BOEING has a "type certificate" for an aircraft model, such as the BOEING 707, VARIG relies upon the fact that BOEING has completed all of the tests and other requirements laid down by the U.S. FAA, in obtaining that type certificate. VARIG neither seeks nor reviews the mass of detailed design drawings, data, tests and other documentation submitted by BOEING

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<sup>10</sup> First Amended Complaint ¶¶ 11-15 (Excerpt of Record in the court of appeals, at 5-7). All parties agree that California law governs this action.

to the FAA when applying for such a type certificate. Such a review is completely beyond the scope and purpose of VARIG's engineering department. Similarly, when a manufacturer like BOEING has completed an aircraft which has been built pursuant to a type certificate, such as PP-VJZ, the U.S. FAA physically inspects that aircraft to see that it complies with the U.S. FAA's Federal Air Regulations ("FAR's") before issuing the individual aircraft an "airworthiness certificate." . . . The airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with the regulations. Neither does the Brazilian Government when the aircraft is registered in Brasil. . . . In summary, the airline purchases an aircraft which it assumes was certificated to a certain level of airworthiness. Thereafter, the job of the airline's engineering and maintenance department is to *maintain* that level of airworthiness and not allow it to degrade.

Ritter Affidavit ¶ 3 (Excerpt of Record in the court of appeals, at 218-19). The Ritter Affidavit remains completely uncontradicted in this case.

The district court granted the government's motion for summary judgment, concluding that VARIG's action should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else, because the Good Samaritan doctrine was inapplicable, and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a), 2680(h). Pet. App. 8a-13a. However, the district court rejected proposed findings of fact submitted by the government to the effect that there was no negligence by the FAA, no reliance by VARIG and no increase in the risk of harm to VARIG.<sup>11</sup>

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<sup>11</sup> The district court struck out the following proposed findings of fact submitted by the government:

[Footnote continued on page 13]

On appeal, the Ninth Circuit reversed. 692 F.2d 1205 (9th Cir. 1982) (Pet. App. 1a-7a). The court of appeals held that the government could be held liable for negligent inspection and type certification of commercial transport category aircraft under California's Good Samaritan doctrine, and that neither the discretionary function exception nor the misrepresentation exception of the Tort Claims Act barred the action. At the same time, the court of appeals also handed down its decision reaching the same result in the *United Scottish* case. 692 F.2d 1209 (9th Cir. 1982) (*United Scottish* Pet. App. 1a-6a). The present case and the *United Scottish* case were both argued on the same day before the same panel of the court of appeals, and both cases raise the same legal issues. In *United Scottish*, however, the government was appealing from a judgment in favor of the plaintiffs following a full trial and extensive findings of fact and conclusions of law.

## REASONS FOR DENYING THE WRIT

### SUMMARY OF ARGUMENT

The Ninth Circuit's decision is clearly correct. That the United States can be held liable under Good Samaritan principles has been well settled since at least 1955, when this Court decided *Indian Towing Co. v. United*

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#### <sup>11</sup> [Continued]

13. The United States of America's inspection and certification of the Boeing 707 aircraft did not increase the risk of harm to Plaintiffs.

14. The United States of America's inspection and certification of the Boeing 707 aircraft did not induce reliance by the Plaintiffs.

17. There was no negligence on the part of the United States of America or any of its employees that was a proximate cause of this accident.

Excerpt of Record in the court of appeals, at 18.

Appendix B to the government's petition in this case correctly omits findings of fact numbers 13 and 14, above, but erroneously includes finding number 17, above. Pet. App. B, 10a.

*States*, 350 U.S. 61 (1955). It is equally well established that the discretionary function exception has no application where, as here, government employees working at the operational level violate highly specific, mandatory government regulations. In effect, the regulations deprive the FAA employees of all discretion and thereby render the discretionary function exception inapplicable. Finally, this Court's recent decision in *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983), disposes of the government's misrepresentation argument. In that case, the Court held that the misrepresentation exception does not bar claims based on the government's negligence in performing its inspection activities. The same rule applies here.

In short, this case does not raise any important legal issue that can fairly be characterized as unsettled. Supreme Court review is therefore unnecessary and certiorari should be denied.

## ARGUMENT

### I. THE GOVERNMENT CAN BE HELD LIABLE FOR BREACHING ITS GOOD SAMARITAN DUTY TO VARIG

The court of appeals held that the government, having voluntarily assumed the inspection and certification of all civilian aircraft, may be held liable under California's Good Samaritan rule for negligent inspection and certification resulting in injury. It said:

An individual inspecting and certifying aircraft design for safety in California would be judged by the rule set forth in Restatement (Second) Torts, §§ 323 and 324A. Therefore, the United States is to be judged under the same rule. . . .

. . . .

The United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft. . . .



. . . The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under that state's good samaritan rule. It follows that the United States also falls within the rule.

Pet. App. 3a, 5a.

Calling this holding "preposterous" (Pet. at 16), the government argues that the Good Samaritan doctrine is inapplicable. The government argues that it cannot be held liable under the Tort Claims Act because the inspection and certification of aircraft is "regulatory conduct" that has no "counterpart" in the private sector and is a uniquely "governmental" function. *United Scottish* Pet. at 13. This is in substance the same shop-worn argument that the government has been making—and the courts have been rejecting—for the last thirty years.

For example, in *Indian Towing Co. v. United States*, *supra*, p. 13, at 64, the government insisted that it could not be liable because operation of a lighthouse is a "uniquely governmental function" that private persons do not perform. The Court rejected this argument, noting that it would "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. As the Court recognized, *all* government activity "is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* Thus, to distinguish between "governmental" and "non-governmental" activities would be "to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.* at 68. The Court also pointed out that to accept the government's argument would be to make liability turn on "a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 67. The

Court was unwilling to attribute any such "bizarre motives" to Congress. *Id.*<sup>12</sup>

We think it fair to say that the "governmental function" defense urged here was completely repudiated by *Indian Towing*. It has been consistently repudiated in subsequent cases,<sup>13</sup> including cases involving air traffic controllers<sup>14</sup> where the government argued unsuccessfully for years that it could not be held liable because its controllers "perform governmental functions of a regulatory nature that are not performed by individuals." *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 73 (D.C. Cir.), *aff'd sub nom.*, 350 U.S. 907 (1955). In *Union Trust* the court of appeals disagreed with the government and this Court affirmed summarily on the authority of *Indian Towing*. *United States v. Union Trust Co.*, 350 U.S. 907 (1955).<sup>15</sup>

Furthermore, the government is incorrect as a matter of fact when it contends here that inspection of aircraft has no counterpart in the private sector. The district court in *United Scottish* found as a fact that private persons inspected aircraft for safety and airworthiness before 1926, when the government began providing such

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<sup>12</sup> *Indian Towing* established the legal principle that the government's liability does not turn on the presence or absence of comparable private activity.

<sup>13</sup> See, e.g., *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957), in which this Court rejected the government's argument that it could not be liable because its firemen act only in a "uniquely governmental capacity."

<sup>14</sup> See, e.g., *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970); *Deweese v. United States*, 576 F.2d 802 (10th Cir. 1978); *Pierce v. United States*, 679 F.2d 617 (5th Cir. 1982).

<sup>15</sup> The court of appeals in *Union Trust* pointed out, among other things, that the private sector had provided air traffic control services until the government took over that function. 221 F.2d at 74.

services. *United Scottish Pet. App.* 18a-19a, 24a. The court of appeals affirmed this finding.<sup>16</sup>

Thus, the "governmental function" defense has been thoroughly discredited; there is no reason to resurrect it here; and in any event it is inapplicable as a matter of fact. The government apparently senses the futility of its position, for it quickly switches to another tack—a general assault on the application of the Good Samaritan doctrine to the facts and circumstances of this case. *United Scottish Pet.* at 15-18. The government does not dispute that it can be held liable under Good Samaritan principles for negligent performance of a service that it has voluntarily undertaken to provide. *Indian Towing* settled that point long ago. *Supra* p. 13, at 64-65. Neither does the government dispute that California law controls and that California has adopted the Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. See *Coffee v. McDonnell Douglas Corp.*, 8 Cal. 3d 551, 503 P.2d 1366, 105 Cal. Rptr. 358 (1972). Having accepted these basic governing principles, the government is left with a series of narrow, technical arguments about how the principles should be applied in this case. All of the points raised by the government are insubstantial and certainly not of sufficient importance to warrant review by certiorari.

First, the government asserts that the FAA merely "retains the option" of inspecting aircraft to ensure compliance with the applicable regulations. *United Scottish Pet.* at 15. This is clearly incorrect as a matter of fact. As discussed above, the FAA's own employees testified in this case that compliance with the FARs is mandatory and that the FAA *must* check *every* component against the regulations before certificating the aircraft.

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<sup>16</sup> The court of appeals in *United Scottish* did not, contrary to the government's suggestion (*United Scottish Pet.* at 15), "acknowledge" that there was no comparable private-sector activity. See *United Scottish Pet. App.* at 1a-6a. In any event, the Supreme Court does not ordinarily review factual disputes. See, e.g., *Bereny v. Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).

See *supra* p. 9. Furthermore, the FAA's governing statute provides that the FAA may not issue a Type Certificate unless it finds that the aircraft meets the minimum safety standards set forth in the FARs. 49 U.S.C. § 1423(a)(2). The statute certainly does not give the FAA the "option" to disregard its own regulations or to ignore violations of those regulations.

We are also informed by the government's petition that airline operators retain "primary responsibility" for the safety of their aircraft. *United Scottish Pet.* at 15. The government does not explain the pertinence of this observation, and none is apparent. VARIG is no more "responsible" for safety than were the aircraft operators in the air traffic controller cases or the tug operator in *Indian Towing*. The government was held liable in those cases, and they cannot be distinguished from the present case on any theory of "primary responsibility."

The government asserts that aircraft passengers are "not entitled" to rely upon FAA safety inspections. *United Scottish Pet.* at 15. The government does not indicate why this should be so. Indeed, it cites no evidence in the record and no court decision, statute, regulation or other authority to support its bald assertion. *Indian Towing* teaches us that when the government voluntarily undertakes to provide a service, members of the public are "entitled" to rely upon the undertaking at least in the sense that they can recover under the Tort Claims Act for negligent performance of the undertaking.<sup>17</sup>

The government also expresses disbelief that any of the passengers actually relied upon the FAA inspections. *United Scottish Pet.* at 16 & n.6. Yet, here, the government is simply arguing against findings of fact made by

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<sup>17</sup> The government also makes the apparently related argument that it owes a duty of care to the general public, but not to any particular member of the public. *United Scottish Pet.* at 14-15. Again, no authority is cited in support of the government's assertion. This argument on its face defies all logic and is directly inconsistent with *Indian Towing* and its progeny and with the air traffic controller cases.

the district court and accepted by the court of appeals. See *United Scottish Pet. App.* 3a-4a, 20a-25a; *Pet. App.* 5a. The losing party's dissatisfaction with determinations of fact does not call for Supreme Court review. In addition, the government has conspicuously omitted any discussion of VARIG's reliance upon the FAA's inspections. The reason for the omission is not hard to find. VARIG's complaint alleged reliance and the government's motion for summary judgment in the district court was not supported by any admissible evidence offered to pierce that pleading. In addition, in opposition to the government's motion VARIG submitted the affidavit of the Manager of its Engineering and Maintenance Base, Frederico J. Ritter, which describes in detail the heavy reliance that VARIG places upon the FAA inspection and type certification. That affidavit was never contradicted in any way by the government. Finally, the district court, even though it granted summary judgment, rejected the government's proposed finding of fact that there had been no reliance by VARIG here.<sup>18</sup>

The government also argues that its negligence did not increase the risk of injury to the passengers. *United Scottish Pet.* at 15. The same response is applicable: VARIG pleaded increased risk; the government never pierced this pleading with admissible evidence and the district court rejected the government's proposed finding of fact that the risk had not been increased. Moreover, under section 323 of the *Restatement*, Good Samaritan liability attaches *either* if the "Samaritan's" negligent performance of his undertaking increases the risk of harm to the plaintiff, *or* if the "Samaritan's" undertak-

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<sup>18</sup> This serves to distinguish *Clemente v. United States*, 567 F.2d 1140 (1st Cir.), *cert. denied*, 435 U.S. 1006 (1978), and *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 2009 (1982), upon which the government relies. *United Scottish Pet.* at 17. As the government itself points out, it won those cases because the plaintiffs were unable to show the requisite reliance.

ing engenders reliance by the plaintiff. The requisite reliance has clearly been established here and the government can be liable based on that fact. In any event, it is obvious that the FAA's negligence *did* increase the risk of harm in this case. If the FAA had not been negligent, Boeing would have been forced to correct the defective design or it would not have received a Type Certificate enabling it to manufacture 707 model aircraft, including VARIG's accident aircraft. VARIG would not have been put in the position of unwittingly operating an aircraft with a defective and unsafe lavatory waste container, and the accident would not have occurred.<sup>19</sup>

The government's final contention concerning duty is that the lower court's decision will put it in the position of "guaranteeing the safety of aircraft" and will make it an "insurer" of all activity subject to safety inspection. *United Scottish Pet.* at 17. This is nonsense. As the court of appeals made clear, the government will be held liable only when it *negligently* performs the duty it has undertaken. *United Scottish Pet. App.* 5a-6a. The government will be forced to pay only when it is at fault. That is exactly what Congress had in mind when it passed the Tort Claims Act. Moreover, the government's dire claims of ruinous liability have become routine in Tort Claims Act cases, and they are routinely rejected by the courts. The Court is not to act "as a self-constituted guardian of the Treasury," by importing "immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, *supra* p. 13. If the financial burdens of the Tort Claims Act should ever become excessive, it

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<sup>19</sup> In this respect, the present case is similar to *Block v. Neal*, *supra* p. 14, in which this Court noted that, according to the plaintiff's allegations, if the government housing inspector had not been negligent, the builder would have been forced to correct the defects or would not have been allowed to turn the house over to the plaintiff.

will be for Congress, not the courts, to find the appropriate remedy.<sup>20</sup>

## II. VARIG'S CLAIMS ARE NOT BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION

The government's second argument is that VARIG's claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (a). *United Scottish Pet.* at 18. The government relies heavily in its argument on certain language in *Dalehite v. United States*, 346 U.S. 15 (1953)—the seminal case on the discretionary function exception. In that case, the Court ruled that discretionary functions include "determinations made by executives or administrators in establishing plans, specifications or schedules of operation," as well as "initiation of programs and activities." *Id.* at 35-36. *Dalehite* held that "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. The governmental decisions in question in *Dalehite* were determined by the Court to have been "responsibly made at a *planning* rather than *operational* level." *Id.* at 42

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<sup>20</sup> To the extent that the purposes behind the Tort Claims Act include deterrence of governmental negligence which can cause injury or death to persons and property, in addition to the purpose of compensation for the victims, the court of appeals decision in this case is in harmony with that purpose. It is also in harmony with the conclusions, findings and recommendations of the congressional committee which investigated the FAA's performance in the inspection and type certification of transport category aircraft following the crash of a Turkish Airlines DC-10 near Paris, France, on March 3, 1974, which resulted in 346 deaths, and the crash of an American Airlines DC-10 at Chicago, Illinois on May 25, 1979, which resulted in 273 deaths. See House Committee on Government Operations, "A Thorough Critique of Certification of Transport Category Aircraft by the Federal Aviation Administration," H.R. Rep. No. 924, 96th Cong., 2d Sess. (1980). In that report the Committee found that "[t]here are serious deficiencies in all three phases of the certification process [design, production and maintenance] which must be corrected [by the FAA] if the record of aviation safety is to be maintained or continue to improve." *Id.* at 4.



(emphasis added). Thus, *Dalehite* established the basic distinction between government negligence at the "planning" level, which falls within the discretionary function exception, and negligence at the "operational" level, which does not. This distinction has been followed in an extremely long line of cases interpreting the discretionary function exception.<sup>21</sup>

The court below correctly applied the foregoing principles in holding that "[t]he duties undertaken by FAA inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the cabinet level secretaries in *Dalehite*." Pet. App. 7a. The court said:

The kind of discretion contemplated by the exemption clause does not exist in certifying compliance with F.A.A. safety regulations. A proper inspection will discover facts. The facts will show either com-

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<sup>21</sup> E.g., *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (failure to enforce regulations and to conduct safety inspections occurred at operational level); *Carlyle v. United States, Dept. of the Army*, 674 F.2d 554, 556-57 (6th Cir. 1982) (extent of supervision of Army recruits lodged at hotel was planning level decision); *Emch v. United States*, 630 F.2d 523, 528 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981) (regulation of bank that became insolvent took place at policy level); *Aretz v. United States*, 604 F.2d 417, 428 (5th Cir. 1979) (failure to change hazard classification of illuminant and to communicate change to defense contractor occurred at operational level); *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973) (negligent operation of aircraft is operational activity); *Ingham v. Eastern Air Lines, Inc.*, supra note 14, at 238-39 (air traffic controller's failure to report weather changes was operational); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 394, 396 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (failure to make study of commercial air traffic patterns in accordance with official direction and to secure flight clearance and traffic information for jet pilots were operational decisions); *White v. United States*, 317 F.2d 13, 17 (4th Cir. 1963) (operational decision to allow mental patient free access to hospital grounds not discretionary); *United States v. Gregory*, 300 F.2d 11, 13 (10th Cir. 1962) (decision to renovate canals resulting in drainage of private fish ponds not operational).

pliance or noncompliance. Aircraft must comply with the regulations in order to be certified.

*Id.*

The government's discretionary function argument in this case has a familiar ring. It was attempted without success in the early air traffic controller cases. As early as 1955 this Court affirmed a statement by the Court of Appeals for the District of Columbia that "discretion was exercised when it was decided to operate the [control] tower, but the tower personnel had no discretion to operate it negligently." *Eastern Air Lines v. Union Trust Co.*, *supra* p. 16, at 77. Eleven years later the Second Circuit followed this rationale in *Ingham v. Eastern Air Lines, Inc.*, *supra* note 14. In *Ingham* the court said:

When the government decided to operate an air traffic control system, that policy decision was the exercise of "discretion" at the planning level, and could not serve as the basis of liability [citing *Dalehite*]. But once having made that decision, the government's employees were required thereafter to act in a reasonable manner. A failure to do so rendered the government liable for the omission or commission.

*Id.* at 238.

VARIG does not dispute that the government's decision—embodied in the Federal Aviation Act of 1958—to undertake inspection and certification of aircraft was made at the planning level and falls within the discretionary function exception. It is no doubt also true that the decision to issue CAR 4b.381(d) and the further determination of what requirements the regulation should contain involved a balancing of competing policy considerations and were discretionary within the meaning of the Federal Tort Claims Act.

However, once CAR 4b.381(d) had been adopted, the role of the FAA plainly descended to the operational level.

The FAA personnel who inspected the Boeing 707 were not acting in an executive planning capacity, nor were they making policy. Their function was simple—to determine whether the 707 complied with the detailed requirements of CAR 4b.381(d) and the other applicable regulations. The FAA inspectors had no discretion to modify or disregard the regulations; they were simply charged with the mechanical, operational task of applying the regulations to the aircraft at hand. As FAA employee Rocco Lippis testified at his deposition, FAA regulations are “mandatory on . . . the certificating engineer,” who is required to “check into every item” to ensure compliance.

The case law is clear that the application of specific, mandatory regulations like CAR 4b.381(d) is not discretionary within the meaning of the Federal Tort Claims Act.<sup>22</sup>

None of the cases cited by the government (*United Scottish Pet.* at 19) provides any support for its position. *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981), held that the discretionary function exception barred a claim that the FAA negligently failed to promulgate crashworthiness regulations. Failure to implement a specific, mandatory regulation was not involved. Similarly, in *Bernitsky v. United States*, 620 F.2d 948 (3d Cir.), *cert. denied*, 449 U.S. 870 (1980), the court

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<sup>22</sup> See, e.g., *Hatahley v. United States*, 351 U.S. 173 (1956) (negligent administration of regulations not discretionary); *Madison v. United States*, *supra* note 21, at 741 (enforcement of safety regulations governing manufacture of explosives not discretionary); *Loge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981), *cert. denied*, — U.S. —, 1025 S. Ct. 2009 (1982) (government has no discretion to disregard mandatory regulatory commands governing licensing and release of polio vaccines); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (implementation of regulation governing polio vaccine testing not discretionary); *United Air Lines v. Wiener*, *supra* note 21, at 394-95 (violation of Air Force regulation dealing with segregation of air traffic made discretionary function exception inapplicable).

found that the complaint challenged the government regulations themselves, not the manner in which they were enforced. The court observed that there was "no analogy between the negligent failure to comply with regulations . . . and the regulatory enforcement activity at issue here." *Id.* at 955. *First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375-76 (10th Cir.), *cert. denied*, 434 U.S. 835 (1977), concerned implementation of a statute and regulations which "staked out only generalized policy standards" for labeling of pesticides, and thus required the government agency "to make policy judgments in evaluating the adequacy of the labeling." The court explicitly distinguished that case from situations where, as here, there is "measurement against given specific standards." *Id.* at 376.

The government argues that "discretion exists when the government attempts to police the safety of an industry and must make complicated and often predictive engineering or scientific judgments about the airworthiness of literally thousands of aircraft." *United States* Pet. at 18. This "engineering or scientific judgment," however, is one kind of discretion which Congress plainly did not mean to exempt from liability under the Federal Tort Claims Act. *See, e.g., Griffin v. United States*, *supra* note 22, at 1066 (government conduct is not immunized when based on scientific rather than policy judgment). While it may be inappropriate for courts to evaluate policy decisions by government officials, courts are routinely called upon to examine the judgments of engineers, doctors and other experts. Such judgments are hardly "essentially subjective," as the government claims. *United Scottish* Pet. at 19. As the Second Circuit has observed, the fact that "judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of courts by classifying them as discretionary functions under the Act." *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). In this case, as shown by the deposi-

tion testimony of Rudolf Kapustin, noncompliance with the regulation here was an "open and shut" case. Not "by any stretch of the imagination" could the Boeing 707 have been considered to meet the fire-protection requirements of CAR 4b.381(d). (Kapustin deposition at 1597, 1625). Thus, no expert evaluation or fine professional judgment was required under the particular facts of this case.

Moreover, the evidence in this case suggests that the government failed entirely to inspect the lavatory or to determine compliance with CAR 4b.381(d). The government's attempt to clothe this failure with the dignity of a policy judgment by alluding to "the magnitude of the FAA's regulatory activities" is entirely disingenuous. *United Scottish Pet.* at 19. Whether or not the FAA is overburdened does not change the nature of the act in question—i.e., an operational level inspection for compliance with a mandatory regulation. If anything, it is the FAA's failure to enforce such safety regulations, not Tort Claims Act litigation, that threatens to "impair [the] vital governmental function" of "enforcing aircraft safety laws." *United Scottish Pet.* at 20.

Finally, it should be noted that the government has admitted that the discretionary function exception would be inapplicable to facts such as those presented here. In oral argument before this Court in *Block v. Neal*, *supra* p. 14, counsel for the United States conceded inquestioning by the Court concerning the discretionary function exception that:

If there were a regulation in this case that said that the government must discover every defect and must make every defect corrected . . . then it would seem to me we would be hard pressed to argue that that is a discretionary decision, *because the regulation will have essentially taken away all our discretion.*

But if the regulation *merely suggests* that we should have inspections . . . then it would seem clearly to be within the discretionary function exception.

Official Transcript Proceedings before the Supreme Court of the United States (Jan. 19, 1983) at 13-14, *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983) (emphasis added). Unlike the regulation as interpreted by the government in *Block v. Neal*, CAR 4b.381(d) does not "merely suggest" that the FAA inspect for fire-containment safeguards. The regulation is mandatory and specific, and takes away all discretion from FAA inspectors in the issuance of Type Certificates.

In summary, this case presents a routine application of discretionary function analysis to the particular facts involved here. The court below correctly held that the exception does not apply. In any event, the Supreme Court does not sit to resolve essentially factual questions, such as those at issue here, on a case-by-case basis.

### III. VARIG'S CLAIMS ARE NOT BARRED BY THE MISREPRESENTATION EXCEPTION

The government's final argument is that VARIG's claims are barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). *United Scottish Pet.* at 20-22. The government's position on the misrepresentation exception has now been squarely foreclosed by this Court's recent decision in *Block v. Neal*, *supra* p. 14, and there is no reason for the Court to consider the issue again in this case.

In the present case the court of appeals found that the misrepresentation exception was inapplicable. It said:

[VARIG's] claims . . . arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate. [citations omitted]. The certification merely reports results of the negligent inspection. *Neal v. Bergland*, 646 F.2d 1178, 1183-84 (6th Cir. 1981), *cert. granted*, 102 U.S. 2267 (1982) . . . .

Pet. App. 6a.

In *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981), *aff'd sub nom.*, *Block v. Neal*, *supra* p. 14, relied upon by the court below, the Sixth Circuit arrived at a similar conclusion with respect to a negligent inspection of a house by an official of the Farmers Home Administration. The government sought a writ of certiorari in the *Neal* case, arguing that the Sixth Circuit should have held the plaintiff's claim barred by the misrepresentation exception. After certiorari had been granted in *Neal* and while the case was under submission, the government filed its certiorari petition in the present case. The government's position here acknowledged that the decision in *Neal* would "have a substantial bearing on the applicability of the misrepresentation exception to this suit." *United Scottish Pet.* at 22. Accordingly, the government suggested that "the Court may wish to hold this petition pending the decision in *Neal* . . ." *Id.*

On March 7, 1983, this Court handed down its decision in *Neal*, affirming the judgment of the Sixth Circuit. The Court held that the misrepresentation exception did not apply because the gravamen of the plaintiff's claim was not the communication of misinformation, but rather the government's failure to use due care in inspecting and supervising construction of the plaintiff's house. The Court explained its rationale in pertinent part as follows:

In this case . . . the Government's misstatements are not essential to plaintiff's negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care. FmHA's duty to use care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use care in communicating information to respondent . . . . Neal's factual allegations



would be consistent with proof at trial that Home Marketing would never have turned the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

....

We therefore hold that respondent's claim against the government for negligence by FmHA officials in supervising construction of her house does not "aris[e] out of . . . misrepresentation" within the meaning of 28 U.S.C. § 2680(h). The Court of Appeals properly concluded that Neal's claim is not barred by this provision of the Tort Claims Act because Neal does not seek to recover on the basis of misstatements made by FmHA officials. Although FmHA in this case may have undertaken both to supervise construction of Neal's house and to provide Neal information regarding the progress of construction, Neal's action is based solely on the former conduct.

Slip opinion at 8-10.

*Block v. Neal* is directly on point here, and it compels rejection of the government's misrepresentation argument. As the court of appeals in this case held, VARIG's claims are based upon the FAA's negligent inspection of the 707 aircraft, not on any incidental communication of misinformation in the Type Certificate or elsewhere.<sup>23</sup> Under *Neal*, the misrepresentation exception clearly does not reach such claims. The issue has now been settled, and review by certiorari is therefore inappropriate.

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<sup>23</sup> See VARIG's First Amended Complaint ¶¶ 7, 13 (Excerpt of Record in the court of appeals, at 3-5, 7-8).



**CONCLUSION**

The court of appeals was clearly correct in reversing summary judgment in favor of the government in this case; there are no reasons for review by this Court; and the petition for a writ of certiorari should be denied. In the alternative, the petition should be granted and the judgment of the court of appeals should be summarily affirmed on the authority of *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983), *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Dalehite v. United States*, 346 U.S. 15 (1953). See *United States v. Union Trust Co.*, 350 U.S. 907 (1955).

Respectfully submitted,

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April 15, 1983

No. 82-1349

Office - Supreme Court, U.S.  
FILED

APR 15 1983

ALEXANDER L. STEVENS,  
CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, *Petitioner,*

v.

EMMA ROSA MASCHER, *et al.*

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On Petition For Writ Of *Certiorari* To The  
United States Court Of Appeals For The Ninth Circuit

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**MEMORANDUM FOR EMMA ROSA MASCHER  
ET AL IN OPPOSITION TO THE PETITION FOR  
A WRIT OF CERTIORARI**

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IN THE  
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UNITED STATES OF AMERICA, *Petitioner,*

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On Petition For Writ Of *Certiorari* To The  
United States Court Of Appeals For The Ninth Circuit

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**MEMORANDUM FOR RESPONDENTS EMMA  
ROSA MASCHER, *ET AL* IN OPPOSITION.**

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On the morning of July 11, 1973, a Boeing 707-300 aircraft operated by Varig Airlines was cleared to descend from its cruising altitude as it approached the Orly Airport, Paris, France. The aircraft was fully loaded, and after an 11 1/2 hour transatlantic flight from Brazil, and a full breakfast, passengers were moving about the cabin making preparations for the final landing at their destination. As the aircraft descended below 10,000 feet, one of the passengers advised a steward of the sudden appearance of a large volume of white smoke in one of the lavatories. In the next few minutes, the smoke turned from white to black, totally filled the passenger compartment, invaded the flight deck forcing the crew to don oxygen masks, and so obscured their vision that they could not see the instruments located but a few feet in

front of them. In an attempt to remove the smoke and save the passenger's lives, they depressurized the aircraft, but to no avail. Recognizing that all aboard would die unless the aircraft could be landed, they opened the sliding windows on either side of the cockpit in order to see the ground and accomplished a successful forced landing in a farmer's field.

Though the landing was successful, the evacuation was not. All passengers save one and many of the extra crew members required to be on board because of the exceptional length of the flight died while strapped in their seats by reason of inhalation of the hydrogen cyanide, hydrogen flouride and carbon monoxide produced by the burning material in the interior of the aircraft.<sup>1</sup>

The French Government issued a report<sup>2</sup> in which it found that the fire probably started in a trash container under the sink in the lavatory which was probably full of paper after the long trip. The French officials also concluded that the trash containers themselves were probably not in compliance with the U.S. regulations under which the aircraft had been built in that they did not contain the fire.<sup>3</sup>

Suit on behalf of survivors of sixty-two deceased passengers was instituted against the Boeing Company,

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<sup>1</sup> Passenger oxygen masks, unlike those of the crew, are ineffective in the case of smoke and toxic gas, since they do nothing more than mix pure oxygen with ambient cabin air.

<sup>2</sup> Annex 13 of the Treaty of Chicago, 59 Stat. 1945 (indexed at 1701) sets forth the procedures and responsibilities for aircraft accident reporting.

<sup>3</sup> CAR 4b 381(d) states in pertinent part: "All recepticals [sic] for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

manufacturers of the airplane, and several subcomponent manufacturers in the Supreme Court, New York County. Shortly after the institution of these cases, suit was also started against the United States under the Federal Tort Claims Act in the Central District of California, the only Court in which the Government could be sued by all plaintiffs.<sup>4</sup>

Following limited discovery of several current and retired Federal Aviation Administration (FAA) employees, the District Judge granted a motion for summary judgment brought by the Government on the grounds that there were no genuine issues of material fact and the Government was entitled to judgment as a matter of law. The findings of fact and conclusions of law of the District Judge are reprinted in Appendix B at 8a of Petitioner's brief. The Court of Appeals reversed the District Court on the ground that, under the facts alleged, the California Good Samaritan Rule would permit recovery against one who negligently inspected an aircraft for compliance with a federal regulation, and that neither the misrepresentation exception, 28 USC § 2680(h), nor the discretionary function exception, 28 USC § 2680(a), would apply on the facts of these cases.

In its brief, the Government explains in broad fashion the statutory scheme pursuant to which inspections of aircraft prototypes and production models are made, and observes that "the vast majority of the FAA's inspections are performed by 'designated engineering representatives' " who are *usually* employees of the manufacturer carrying special FAA designation. (Pet. Brief at 5) (em-

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<sup>4</sup>28 U.S.C. 1402(b) provides that suit against the United States may be instituted in the U.S. District Court where the plaintiffs reside or where the act or omission occurred.

phasis added) The Government, however, would have done well to explain further that a vast difference exists between the method by which general aviation aircraft are inspected and the method by which commercial air carrier planes (such as the Boeing 707) are inspected.

In the former category, which concededly comprises the "vast majority" of aircraft manufactured in this country, inspections are done mainly by the designated engineering representatives (DER's). In the instant case, however, the record shows that the offending inspection was done by FAA employees, and the lavatory waste receptacle design which they supposedly inspected could not conceivably have met the minimum standards required by the regulations. Examination of a sister ship in Rio de Janeiro, Brazil, after the accident revealed that the trash "container" under the sink in the lavatory was in reality no container at all. Paper towels stuffed into the flapper door at one side of the sink module simply fell down into the area directly below the sink. This volume of space also contained the electric water heaters. Not only was there no container, as such, but the module walls themselves were penetrated in several spots by large round holes, the purpose of which was never established and the presence of which simply assured that any fire developing below the sink would have an adequate supply of oxygen and immediate access to the inside of the aircraft pressure hull.

In fact, even the FAA engineer detailed to investigate the accident stated in a report addressed to his seniors:

It was also observed in the waste container area of most lavatories that there were numerous holes through the vertical panels between compartments leading to other compartments and in some cases to the aircraft skin. This created an interesting revelation and *it was not clear how the waste containers*

*could possibly contain fire*, as required by CAR 4b 381(d) and FAR 25.853(d) (1 Nelson Dep. Ex. 26) (emphasis added).

That same engineer drafted a proposed Airworthiness Directive in which he made the determination that "most containers in all jet transportation must be modified to provide simple and obvious containment" (2 Nelson Dep. at 357). In his opinion, the aircraft would not have been certified "if it had not been approved-reviewed" by FAA inspectors (2 Nelson Dep. at 442).

(FAA) Manufacturing inspectors should be alert for any detail design feature which does not appear to comply with pertinent regulations (1 Nelson Dep. Ex. 34, p. 39, ¶ (b)).

A letter dated March 20, 1967 from Boeing to the Director, Western Region, FAA, states, with respect to inspection of the interior of Boeing 707 aircraft by FAA personnel:

There were numerous items found during the inspection which were considered unacceptable by Mr. Bulmer *and were modified to his satisfaction prior to delivery of the airplane* (Curtis Dep. 151).

Depositions of that engineer revealed that he knew the reason his position or job existed was to promote air safety (Bulmer Dep. at 89). He further knew that the beneficiaries of his work were the flying public and the operators of the airplanes (*Id.*). He also knew the flying public depended on him to do his job in the interests of air safety (Bulmer Dep. at 90).

The former Chief of the Aircraft Engineering Division of the Western Region of the FAA and present Director, Office of Airworthiness, agreed that two different inspection and certification systems are in effect, one available only to manufacturers of general (light) aviation aircraft



and the other to transport category aircraft (Beard Dep. at 14, 38, 109).

According to the regulations governing the first system, the manufacturer itself accomplishes the inspection and approval as the Petitioner emphasizes in its brief. In the second, employees of the FAA accomplish these functions (Beard Dep. at 14). Such differences are not required by statute (Beard Dep. at 111).

He also testified that an airworthiness certificate signifies to the public and the manufacturer that a particular airplane conforms to an approved design and is in condition for safe flight (Beard Dep. at 48). Likewise, type certificates are given immediate publicity by the manufacturer "because they were so proud they could get the certificate and it helped them in their marketing . . ." (Beard Dep. at 50, 51). A statement is also published in the Federal Register "to advise the world that we have issued a type certificate" (Beard Dep. at 52).

Foreign registered aircraft that have a standard airworthiness certificate issued by their own country can fly in the United States if the country of registry is a signatory to the Chicago (ICAO) Convention, Annex 8 (Beard Dep. at 54).

Various inspections are conducted by the FAA, including compliance inspections, conformity inspections, production system inspections and aircraft inspections (Beard Dep. at 113). The purpose of all inspections is air safety, and the intended beneficiaries are the passengers and the operators of the airplanes (Beard Dep. at 114, 115).

The factual picture which thus emerges is quite different from that which appears from a reading of Petitioner's brief. The substance of it is this: That the Congress gave

the Administrator of the FAA authority to approve aircraft designs, prototypes and production models. The FAA, through regulations, then voluntarily undertook to do so in two different ways; one with respect to private or "general aviation" aircraft and another with respect to aircraft intended for the carriage of passengers for hire. In the latter category much more stringent inspections were made far more often by many more FAA engineers. This fact received wide publicity and many members of the flying public, including some if not all of the passengers aboard the fated flight, relied to some greater or lesser extent on these engineers to do exactly what the FAA said they should do—inspect for compliance with the minimum standards predicated by regulations.

Moreover, in the instant case, a Government engineer either inspected and failed to note the obvious deficiencies which glared out at the accident investigators when they opened the inspection doors under the sink of the lavatory module in the sister ship of the ill-starred Boeing 707 in Rio, or perhaps, *he mandated the changes which caused the accident.*

It is on *these* facts that the Court is asked to grant *certiorari*.

Petitioner attempts to obfuscate the real legal issues involved in this appeal by the wild utilization of scare tactics to convince this Court that, by properly holding that an FAA employee's negligent conduct of his ministerial functions is actionable, the floodgates of litigation will open exposing the Government to potential liability in its "countless health and safety inspections." *United States v. United Scottish Insurance Co.*, Petition for certiorari, No. 82-1350 (filed February 11, 1983) at pp. 10-15. The Government lists several federal agencies which inspect and certify various aspects of interstate commerce in an

attempt to manufacture a "parade of horrors" which supposedly will take place if the Circuit's opinion is upheld. By waving this red herring in the face of the Court, however, the Petitioner destroys other arguments in several respects.

First, by listing several agencies which have been assigned some form of inspection and certification activity, the Government acknowledges by implication the level at which policy decisions are made. Each "regulatory agency" is given a broad mandate by Congress and in the agency's top level administrators thereafter make the policy decision of how best to implement that mandate. It is at that level that discretion is invoked within the meaning of *Dalehite v. United States*, 346 U.S. 15 (1953). Regulations are issued to detail and delineate the duties and responsibilities that the agency has assumed.

Once implemented however, the agency personnel must properly conduct the attendant duties and responsibilities. Failure to do so gives rise to tort liability.<sup>3</sup>

By listing some of the agencies which have voluntarily elected to define their mandate to include inspections and certifications, the Petitioner impliedly admits that there are others which have elected to conduct business otherwise. In the analagous circumstance of the manufacturer of automobiles, for example, no supervising federal agency requires its employees to make design and production inspections similar to those required by FAA regulations.

The FAA at its highest administrative level has decided as a matter of policy to establish inspection programs. Once each of the regulations implementing that policy were established and defined, as was done with

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<sup>3</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

CAR 4b.381(d), and the inspection duties were assigned to individual FAA employees, the inspectors were required to perform their function non-negligently. It is important to note again that there is nothing in the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, that requires the FAA to devote personnel to make on-site compliance inspections. The Federal Aviation Act merely states that the FAA must perform its duties "in such a manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation. . . ."

As a collateral matter, and in refutation of Petitioner's assertion that recovery should be barred because aircraft inspections are the Government's "quintessentially sovereign function" (such that there is no waiver of tort immunity because, supposedly, there is no parallel liability for private individuals,) it should be noted that the very system voluntarily chosen by the FAA provides for aircraft inspection by private individuals. The duality of the methodology established by the FAA provides for the utilization of private individuals, the DER's employed by the aircraft manufacturer, to ascertain compliance with the standards required by the regulations. While use of DER's is particularly widespread with general aviation aircraft manufacturers, it is also frequently used in the inspection of commercial aircraft, the FAA inspectors being personally involved only at the more critical stages, such as was the case here.

An important distinction must be made between the FAA's inspection and certification responsibilities. Although the FAA must certify civil aircraft for airworthiness pursuant to 49 U.S.C. § 1423, the manner of setting

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\*49 U.S.C. § 1421.

the criteria and assuring that the design standards have been met are left to the discretion of the agency. The FAA inspectors have a duty to use due care to ensure that the aircraft manufacturer adheres to previously approved regulatory standards and/or to cure all defects before production.<sup>7</sup> If the FAA inspectors fail in this duty, then the tort responsibility is essentially for the negligent inspection although an end result may also be that a defective product is also certified as airworthy when, in fact, it is not.

#### **Reasons Why *Certiorari* Should Not Be Granted**

The Ninth Circuit found as a matter of law that the California Good Samaritan Rule, as applied to this case by the Federal Tort Claims Act,<sup>8</sup> would give rise to a cause of action not barred, under the facts alleged, by the discretionary function exception<sup>9</sup> or the misrepresentation exception.<sup>10</sup> It is thus a case the outcome of which will depend upon the proof adduced at trial and applied in accordance with state law on the issue of existence of a duty, and federal law, on the twin issues of discretionary function and misrepresentation.

There can be no question that an actionable duty may rise under the Tort Claims Act by reason of the application of a state Good Samaritan Rule.<sup>11</sup> That leaves only the discretionary function and misrepresentation exceptions.

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<sup>7</sup> *Griffin v. United States*, 500 F.2d 1059, 1069 (3d Cir. 1974).

<sup>8</sup> 28 U.S.C. § 2674.

<sup>9</sup> 28 U.S.C. § 2680(a)

<sup>10</sup> 28 U.S.C. § 2680(h)

<sup>11</sup> *Indian Towing Co. v. United States*, *supra* footnote 5.

On these issues, the Government urges that the Court hold the petition in the instant case pending disposition of its petition in a companion case, *United States v. United Scottish Insurance Co.*, No. 82-1350. In its petition in that case, the Government further asks the Court to hold the *United Scottish* petition (and thus this one) pending its decision in *Block v. Neal*, 103 Sup. Ct, 1089 (1983).

Respondents Mascher, *et al.*, agree with the Government. *Block v. Neal* disposes of the misrepresentation issue, and by implication, also argues forcefully that this is a case to be returned to the District Court for trial on the merits, not one in which "special and important reasons"<sup>12</sup> for *certiorari* exist, or a situation in which lower court has "so far departed from the accepted and usual court of judicial proceedings" as to call into play this Court's power of supervision.<sup>13</sup> Certainly it does not amount to "an important question of federal law which has not but should be decided by this Court."<sup>14</sup> *Certiorari* should be denied.

Respectfully submitted,

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<sup>12</sup> Sup. Ct. R. 17.1

<sup>13</sup> Sup. Ct. R. 17.1(a)

<sup>14</sup> Sup. Ct. R. 17.1(c)



**NOV 15 1983**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1983**

ALEXANDER L. STEVENS,  
CLERK

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES)**

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**EMMA ROSA MASCHER, ET AL.**

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**UNITED SCOTTISH INSURANCE CO., ET AL.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

**JOINT APPENDIX**

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**PETITIONS FOR WRITS OF CERTIORARI FILED  
FEBRUARY 10, 1983  
CERTIORARI GRANTED MAY 16, 1983**



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### Relevant Docket Entries

CV76-187-WPG

Date	NR.	Proceedings
1/16/76	nm	Fld Complt. Issd summs. Fld Req & ORD for serv of process by other than USM, naming Gary C. Kuist.
2/3/76	jmn	Fld pltf Varig Airlines, note of chg of address of cnsl.
	jmn	Fld pltf's Varig Airlings note of tkg depos of Rudolph Kapustin on 2/11/76 at 9:30AM.
2-9-76	mn	Fld ORD (R for RJK) (WPG) dtd 2-4-76 transfg actn to the calendar of Judge William P. Gray for all fur procdngs. Attnys notified.
3-8-76	jmr	Fld deft's ANSWER to complaint.
3-11-76	jmr	LODGED deft's proposed ord of transfer of action.
3-19-76	1w	Fld ORD(WPG) transferring action to USDC Western District of Washington. Mld cpys to prties & notfd prties. cc to clk civil. (ENT 3/19/76)
3-25-76	mn	Mld to USDC, W/D of Washington, cc Ord of Transf, cc docket and all original docs except Ord of Transf which is retained. Attny notified.
4-2-76	mn	Rec'd from USDC, W/D of Washington, copy of transmittal letter. Given case no. C76-232M.
4-23-78	nm	Rec'd from USDC, W/D of Washington, their file on Case #C76-232M. Fld each of the following documents.
Mar.31	7	Filed Varig's notice of depositions of Prater Hogue, Hall Piper, The BOEING officer charged with the duty of obtaining a Type Certificate for BOEING 707 aircraft, The BOEING officer charged with duty of designing and obtaining certification of lavatories of BOEING 707 aircraft.

Apr.13		Filed Joinder of United States in Boeing's motion for appointment of Master and Motion of United States to vacate notice of deposition
Apr.16		Ent. order continuing on stipulation Deft. Boeing's motion to appoint Special Master to 4/30/76. Deft. Boeing & Weber's motion to limit terminate or limit deposition of Rudolph Kapustin denied. Order to be signed.
Apr.30		Ent. Order, granting Defendant's Boeing's motion for appointment of Special Master. Order to be signed.
May 5		Filed Affidavit of Mark A. Dombroff in response to: (1) Varig's opposition to Boeing's motion for appointment of a special master: and (2) Varig's motion to apply the provisions of the manual for complex and multi-district litigation to these cases and for an order setting a first principal pretrial conference, a schedule for the first waiver of discovery and establishing a document depository and statement of reasons in support.
May 27		See C76-169M for filing of deposition of Rudolf Kapustin
Jul 6	10	Filed letter approved by Court for service of Special Master at amount of \$272.60 to May 31, 1976.
	11	Filed letter approved by Court for service of Special Master at amount of \$942.50 for June 1, 1976 to June 30, 1976.
Jul 22	11a	Govt. motion to dismiss, notice of hearing Aug. 13, affidavit of Mark Dombroff and memorandum filed.
	11b	
	11c	
Jul 27	12	Filed Stipulation rescheduling government's motion to dismiss for 9/24/76 from 8/13/76 and Varig's opposition papers to be filed no later than 9/20/76, at 4:30 P.M. Counsel notified.
	12a	Filed Renotice of Motion of U.S. of A. to 11/5/76

Aug. 2		Filed Responses to Varig's modified Interrogs by Weber Aircraft Corp. First Set, see C76-169M for documents
Aug. 2		Filed Varig's interrogs to def. Boeing (Second Set) and answers thereto
Aug. 3		Filed Boeing's responses to Varig's fourth set of request for documents -see C 76-169 for documents
Sep. 10	13	Filed Motion of Weber Aircraft to Compel Varig Airlines to Produce Documents, and to Strike Objections; Affidavit of Joseph E. Gregorich and Memorandum of Points and Authorities in Support Thereof
	14	Filed Motion of Weber Aircraft to Compel Varig Airlines to Respond to Interrogatories, and to Strike Objections (Second Set); Affidavit of Joseph E. Gregorich and Memorandum of Points and Authorities in Support Thereof
	15	Filed Motion of Weber Aircraft to Compel Varig Aircraft to Compel Varig Airlines to Respond to Interrogatories, and to Strike Objections
Sep 10		(First Set) Affidavit of Joseph E. Gregorich and Memorandum of Points and Authorities in Support Thereof.
Sep 20		Filed Varig's Memorandum of Points and Authorities in Opposition to Government's Motion to Dismiss
Sep 23		Ent. order continuing def's motion to dismiss to 9:30 a.m. 10/8/76 Mr. Dombroff to notify counsel and Clerk has notified Mr. Smith.
Oct 4		Filed United States' Memorandum in Reply to Points and Authorities Filed by Varig in Opposition to Government's Motion to Dismiss
Oct 4		Filed Varig's Rebuttal to United States Memorandum in Reply to Points and Authorities filed by Varig in Opposition to Government's Motion to Dismiss
Oct 8		Def.'s motion to dismiss continued to 10/15/76
Oct 15		Motion to dismiss continued to 10/19/76
Oct 19		Def.'s motion to dismiss under advisement.

- Oct 21 Filed Order (entered 10/22) denying Plaintiff's motion for a continuance of defendant's Motion for Summary Judgment. Copy to counsel.
- Dec. 8 Filed and entered Order Denying Defendant's Motion to Dismiss. Copy to counsel.
- Dec. 27 Filed Varig's Memorandum of Points and Authorities in Opposition to the United States' Motion for a Protective Order,
- 1977
- Jan. 6 Filed United States of America's Memorandum in Support of Motion to Vacate and to Establish a Consolidated Discovery Schedule
- Jan. 14 Filed United States of America's Memorandum in reply to Varig's Opposition to the United States Motion for Protective Order
- Jan. 31 Filed Varig's Reply Memorandum in Opposition to the Government's Motion for a Protective Order
- Feb. 22 Filed Varig's Motion to Vacate Order of Reference and to Retransfer to the Central District of California  
 Filed Varig's Memorandum of Points and Authorities in Support of its Motion to Vacate Order of Reference and to Retransfer Case to Central District of California  
 Filed Affidavit of Phillip D. Bostwick and Appendix in Support of Varig's Motion to Retransfer  
 Filed Notice of Motion to Vacate Order of Reference and to Retransfer to the Central District of California for 3/4/77
- Mar. 9 Filed United States of America's Affidavit in opposition to Varig's Motion to Vacate Order of Reference and to Retransfer case to the Central District of California  
 Filed Affidavit of Jonathan Howe, Regional Counsel, Northwest Region, Federal Aviation Administration
- Mar. 18 Filed Reply Memorandum and appendix in Support of Varig's Motion to Vacate Order of reference and to retransfer



Plaintiff's motions to vacate order of reference and retransfer under advisement.

1978

Jan. 20

Filed Order retransferring case to the Central District of California and vacating orders of 5/5/76 and 5/19/76 referring case to George Bovington as Special Master. Copy to counsel.

1/23/78

nm

Fld cc Ord of Transf, cc docket, & ltr of transf. Attys notified. Md re-opening 33.

3/27/78

sam

Fld deft Weber resp to pltf's req for prod of documents 2nd set.

8/11/78

rlb

34. Fld Varig's ntc of mot, rtnble 9/25/78 at 10am, for consolidation.

35. Fld Varig's memo of P/As In suppt of mot to consolidate.

8/24/78

aj

36. Fld USA respnse to Varig's mtn for consolidation.

9-8-78

rc

37. Fld pltf's note of mtn & mtn for order compelling discovery; retnbl 9-25-78

38. Fld pltf's Memo of P&A in support of mtn to compel discovery.

9/11/78

rlb

39. Fld stip & ORD (IH for WPG) re dscvry.

9-19-78

kc

40. Fld pltf Variz Airlines' memo & affid in oppstn to United States' motn for consolidation.

9-20-78

kc

41. Fld pltf Varig Airlines' note of depos of Donald Swett on 4-17-78, John V\_\_\_\_\_ on 4-19-78, Robert Rotberg on 4-20-78, Victor Bassotti on 4-24-78, J. Turr on 4-26-78, & Pat Vaughn on 4-27-78.

42. Fld pltf Varig Airlines' certif of cnsl in compliance w/Loc Rule 3(L).

10/12/78

lb

43. Fld pltf Varig's memo of P&A in supp of mot to strike Kidde's 4th affirmatv defense.

44. Fld pltf Varig's note of mot & mot to strike 4th affirmatv defense retnbl 10/30/78 10AM.

45. Fld pltf Varig's note of mot & mot to strike deft USA's 1st & 2nd defenses retnbl 10/30/78 10AM.

46. Fld pltf Varig's memo of P&A in supp of mot to strike USA's defenses.

47. Fld pltf Varig's note of mot & mot to strike kidde's 4th defense or in the for an ord revising the s/j ord of 1/14/77 w/ affid in supp.
- 10-23-78 kc 48. Fld pltf VARIG Airlines' note of motn & motn for cont of Kidde's motn for & affid in support retble 10-30-78.
49. Fld pltf VARIG Airlines' affid of Phillip D. Bostwick in support of motn to strike deft Kidde's 4th affirmative defense.
50. Fld plt VARIG Airlines' memo of P/A's in support of VARIG's motn for cont Kidde's motn for S/J.
- 10-23-78 kc 51 Fld deft's memo of P/A's in oppstn to Varig's Motn to strike affirmative def & cntr-motn of U.S. to dism.
- 10-25-78 kc 52. Fld deft USA's supple brief & response to pltf passengers' brief in support Varig's motn to strike affirmative defenses of the U.S.
53. Fld deft Weber Aircraft's memo of P/A's in response to Varig's motn for conte Kidde's motn for S/J.
- 10-26-78 kc 54. Fld deft USA's motn in oppstn to Varig's ex parte reqst to cont retnble 10-30-78.
- 11/14/78 lb 55. Fld deft's note of cntrmot & cntrmot to dism retnbl 12/11/78 2 PM.
- 12/8/78 pg 56. Fld deft's aff of Cecile Hatfield.
- 12/13/78 pg 57. Fld defts reply to Varig's response to US mot to dism.
- 12/15/78 pg 58. MIN ORD: Hrg on OTC to set aside S/J: Crt ORD discharged—OSC & reaffirm the S/J. deft Boeing shall submt memo re cert. for interlocutory apeal by 1/14/78. Re Mot to dism by deft GNRTD pltf's mot to strk gvmts affirmative defense is DEN.
- 6/15/79 jmw 59. Fld pltf Varig's note of tkg DEPOs of: Chief of Aircraft Engineering Div FAA West Region, 6-25-79/9:30 am; FAA employee responsible for review'g docs re Boeing 707, 6-26-79/9:30 am; unknown indiv (see

note), 6-28-79 at 9:30 am; unkn indiv(see note), 7-9-79/9:30 am; unkn indiv (see note) 7-10-79/9:30am; unkn indiv(see note) 7-12-79/9:30am; unkn indiv(see note) 7-13-79/9:30am.

- |         |     |  |
|---------|-----|--|
| 6-5-79  | jmw | 60. Fld pltf Varig's renote of motn for ORD cmpelg disc fr U.S.A. (orig fld w/Crt 9-8-78) for retnbl 6-11-79/10am.<br>61. Fld pltf Varig's A/Note of DEPO of Custod Boeing rcrds, 6-22-79/9:30am   |
| 7/6/79  | jmw | 62. Fld pltf's cert of cnsl in cmpliance w/loc rul 3(L).   |
| 7-15-79 | gll | 63. Fld deft, Weber Aircraft Corp, reply memo fr motn fr S/J; affid of Joseph E. Gregorich.  |
| 7-18-79 | jmw | 64. MIN ORD: PROCDGS: ORD tha deft Weber's mot S/J stand sbmt'd; ORD GRNTG pltf Varig's mot to compel as to req 17 & 19.   |
| 7-26-79 | gll | LODGED prop ord re pltf's motn to compel discov.   |
| 7-27-79 | gll | 65. Fld ORD (WPG) granting Varig's motn to compel prod of docs; USA to prod docs by 7-18-79; USA to provide list of names & addresses re note of depos: thereafter Varig sh be prmt'd to depose 7 prsns.   |
| 8-12-79 | gll | 66. Fld stip & ORD (WPG) cont motn fr S/J to 6-18-79, 2pm; fur stip that motn of Varig to compel discov agnst USA cont to 6-18-79 2 p.m.   |
| 8-20-79 | gll | 67. Fld pltf's subst of attys & ORD (WPG) subst Joseph T. Cook of Speiser, Krause & Madole.  |
| 8-12-79 | lf  | 68. Fld plts note of tkg depos of Richard Nelson on 8-21-79 & Rocco Lippis on 8-28-79.   |
| 8-10-79 | lf  | 69. Fld plt's note of motn & motn for ord settng discov cut-off date, final PTC & trial retnbl 8-27-79, 2PM<br>70. Fld pltf's memo of P&A in supp of motn for ord settng discov cut-off date, final PTC & trial<br>71. Fld pltf's note of motn & motn for sanctns for gov'ts failure to comply w/dis ord |

72. Fld plt's memo of P&A in supp of motn for sanctns for gov'ts failure to comp w/discov ord
73. Fld plt's memo of P&A in supp of motn for lv to tk depos of Boeing Employees
74. Fld plt's note of motn & motn for lv to tkg depos of Boeing Employees
- 8-22-79 lf 75. Fld pltf suppl memo on the 9th circuit's sas opinion
76. Fld pltf's aff of Phillip D. Bostwick in oppos to Boeing's motn to quash or modify Varig's subp & in supp of Varig's motn to lv to tk depos of Boeing
- 8-27-79 lf 77. MIN ORD: motn for S/J fr Kidde is denied; depos of USA to be tkn; motn for sanctns tkn off cal
- 9-14-79 lf 78. Fld def't's gov't memo in oppos to Varig's motn for crt-approvd discov sch & discov cut-off date
- 9-14-79 lf 79. Fld pltf's oppos to discov sch & discov cut-off
- 11-6-79 lf 80. Fld pltf's renote of depos of Richard Nelson on 11-13-79
- 11-13-79 lf 81. Fld pltf's renote of depos  
LODGED pltf's prop ord re depos
- 11-23-79 lf 82. Fld ORD re depostns; depos of Richard Nelson & Rocco Lippis shall not go for cnsl for Mascher shall mk himself availbl in December for 7 depos: govt mk availbl list of 7 wits; depos complete by 12-31-79
- 11-29-79 lf 83. Fld plt's Varig's amd renote of depos of Richard Nelson on 12-4-79, Rocco Lippis on 12-10-79, Jack Bulmer on 12-11-79, Harold Tanke on 12-12-79 & William Van Brockdorff on 12-13-79. Issd 3
- 12/17/79 lp Fld DEPOSITION of John F. Turner takn on 12/17/79, Vol. I.
- 12/17/79 lp Fld DEPOSITION of Patrick Vaughn takn on 4/27/79, Vol. I.
- 2-5-80 lf 84 Fld pltfs renote of depos of Richard Nelson on 2-8-80

2-8-80	lf	85 Fld pltf's amd renote of depos of Richard Nelson on 2-20-80
5-15-80	sb	Fld DEPOSITION of Harold Frederick Tanke tkn on 12-12-79 Fld DEPOSITION of Jack K. Bulmer tkn on 12-11-79, Vol. I Fld DEPOSITION of Jack K. Bulmer tkn on 12-12-79, Vol. II
5-20-80	srl	LODGED pltf's prop ord
5-20-80	srl	86. Fld pltf's renot of motn for sanctns for failure of the US to comply w/crt's discov ord etc RTNBLE 7-7-80 10AM
5-23-80	lf	87 Fld pltf's renote of depos of Wes Slifer on 7-9-80; an employee of the boeing on 7-10-80
6-26-80	kt	88 Fld deft's memo in oppo to pltf Varig's motn for sanctns & for lv to file a 1st amended complt
7-2-80	kt	89. Fld pltf's renot of depo of Wes Slifer on 7-9-80 & Raleigh Curtis on 7-10-80 90. Fld pltf's reply memo in supprt of its mot & for lv to file a 1st A/C
7-7-80	lf	91 MIN ORD: crt ORDS depos of Mr. Curtis to be tkn, pltf's mtn to amd GRANTD; govt mtn to dismiss rtnbl 11-24-80, 10AM; govt may file suppl papers, pltf respons due 11-7-80, govt reply due 11-17-80
7-10-80	kt	92. Fld pltf's FIRST AMENDED COMPLAINT
	lf	LODGED prop ord
12-11-80	lf	93 Fld ORD that Varig's mtn for sanctns is denied; Varig's mtn for lv to file 1st A/C grantd; mtn for lv to tk the depos of Mr. Raleigh Curtis GRANTD; US mtn for S/J due 9-30-80; oppos due 11-7-80 & reply brief due 11-17-80; rtnbl 11-24-80 2PM
11-11-80	sb	Fld DEPOSITION of Rocco Louis Lippis tkn on 12-11-79 Fld DEPOSITION of Rocca Louis Lippis tkn on 12-10-79

- 11-20-80 lf 94 Fld pltf's note of tkg depositions of Wes Slifer on 9-3-80; Raleigh Curtis on 9-4-80, The FAA Official on 9-15-80 & Craig Beard on 9-16-80
- 11-20-80 lf 95 Fld depositions USA ANSWER TO FIRST AMENDED COMPLAINT
- 12/1/80 rlb 96. Fld Varig's amended note of tkg depositions of various deponents on various dates.
- 12-12-80 rlb 97. Fld stip & ORD that US file motion for S/J on or before 10/31/80; opposition on or before 11/30/80 reply on or before 12/8/80; Hrg on motion 12/15/80, 2 pm.
- 12-11-80 md 98. Fld plaintiff Varig's amended note of tkg depositions of M. Craig Beard, FAA on 10-21-80 and Wes Slifer, FAA aero. engr on 10-22-80
- 12-2-80 md 99. Fld defendant note of motion, returned 12-15-80, 2:00 pm.  
100. Fld defendant material facts as to which there is no general issue  
LODGED defendant proposed findings of fact & conclusions of law  
LODGED defendant proposed order for entry of S/J in favor of defendant & against plaintiffs Varig & Mascher, et al.
- 12-29-80 md 101. Fld plaintiff Varig Airlines note of flight depositions of Rocco Lippis, taken 12-10 & 11-79; Jack Bulmer, taken 12-11 & 12-79; & Harold Tanke, taken 12-12-79
- 12-6-80 md Fld DEPOSITION of Rolland C. Curtiss taken 10-10-80.
- 12-8-80 md 102. Fld plaintiffs' Stip & ORD containing defendant United States' motion for S/J & plaintiffs' motion for leave to amend complaint to 1-26-81, 2:00 pm. Response by Varig & Mascher to U.S. motion for S/J due on or before 12-17-80 & reply by defendant due on or before 1-7-81
- 12-2-80 md LODGED plaintiffs' proposed order  
103. Fld Varig's memo of P&A in opposition to the defendant US's motion for S/J.  
104. Fld Varig's appendix in opposition to US's motion for S/J. (exhs)  
105. Fld Varig's statement of general issue of material fact.

- 12-14-80 md 106. Fld pltf note of flg depo of Rolland C. Curtis on 11-26-80.
- 1-6-81 md 107. Fld deft's reply memo to pltf Varig's memo in oppo to U.S. mot for S/J.
- 1-20-81 md 108. Fld pltf Varig Airlines mot to strike affs of Cecile Hatfield & Melvin Craig Beard.  
109. Fld pltf Varig's memo of P&A in sppt of mot to strike affs  
110. Fld pltf Varig's note of mot to strike affs, rtnbl 2-17-81, 10 am  
111. Fld pltf Varig's memo of P&A in rebuttal to US mot for S/J.
- 1-6-81 md Fld DEPOSITION of Weston B. Slifer tkn 10-22-80.  
Fld DEPOSITION of Weston B. Slifer tkn 10-23-80.
- 1-26-81 md 112. MIN ORD: Crt hrs oral arg & grts deft's mot for S/J. Pltf may fi objts to s\_\_\_\_ prop fndgs at which ti crt will fi jdgmt & fndgs.
- 2-4-81 md 113. Fld pltf Varig Airlines note of flg depo of Melvin Craig Brd, tkn 10-21-80 & Weston B. Slifer, tkn 10-22-23, 1980
- 3-6-81 md 114. Fld Fndgs of Fact & Concls of Law (WPG) tht S/J will be grtd in fav of deft United States. (ENT 3-9-81) Mld cpys & notes to prtys.  
115. Fld ORD (WPG) tht jdgmt be ent in fav of deft United States & agnst pltf's Varig and Mascher, et al. (78-0914-WPG) (ENT 3-9-81) Mld cpys & notes to prtys.
- 3/29/81 fb 116. Fld plft NOTC OF APPEAL to the 9th Cir. C/A fr ORD ent on 3/9/81; \$70.00 Clk's fee & docket fee paid.
- 5-6-81 sb 117. Fld pltf's designation Rpt trans
- 7/24/81 am Fld rprr's transcrs. of proceedings held on 12/15/78, 6/18/79, 8/27/79, 7/7/80, 1/26/81.



## EMMA ROSA MASCHER, ET. AL

1/9/78	sam	1. Fld complt. Issd summs.
1/13/78	rlb	2. Fld app & ORD that Charles F. Krause be allowed to appear as non resident atty & naming Ted Orliss as local cnsl. 3. Fld app & ORD that Donald W. Madole be allowed to appear as non resident atty & naming Ted Orliss as local cnsl. 4. Fld app & ORD that Robert R. Smiley III be allowed to appear as non resident atty & naming Ted Orliss as local cnsl.
4/18/78	rlb	5. Fld summs rtnd srvd 3/17/78.
4/28/78	ct	6. Fld ORD (R) (WPG) dtd 4/28/78, transfg the actn to the cal of Judge Gray for all fur predgs. Attys notified.
5/22/78	rlb	7. Fld deft's ANSWER to COMPLAINT.
5/24/78	ct	8. Fld USA's Ntc of Mtn & Mtn rtble 9/25/78, 10am for consolidtn.
5-15-78	dg	9. Fld pltf's stmt in supp of mot by USA to consolidate
6-21-78	dg	10. Fld pltf's note of tk depos of various deponents, various dates
9/25/78	rlb	11. MIN ORD: ORD mot pltf to compl dscvry go off cal; Hrg mot plf for lv to amnd & consol & Ord Grtng mot to amnd cmp & mot to consolidate as to CV75-2325 & 6-187 a to hrg of legal mots only
10-20-78	lf	12. Fld pltf's memo of P&A 13. Fld pltf's memo of P&A 14. Fld pltf aff of Robert R. Smiley III 15. Fld pltf stmt of the case
10/23/78	rlb	16. Fld US's memo of P/As in opp to Varig's mot to strk affrm defenses & counter mot to dsm.
10/25/78	rlb	17. Fld US' suppl brief & 'rsp to pltf Passengers' brief in suppt of Varig's mot to strk affrm defense of US.
10/26/78	rlb	18. Fld rsp of pltf's Mascher et al's to opp of deft US to Varig mot to dsm & cntr mot of US to dsm.

19. USA mot In opp to Varig's ex parte rqst to cont.
- 1/14/78 rlb 20. Fld USA'sntc of countermot & countermot to dsm.
- 1/20/78 rlb 21. Fld plfs' suppl brief in opp to Mot by deft for S/J.
- 2/8/78 rlb 22. Fld affd Hatfield & memo in opp to Varig's mot for ord compelling dscvry.
- 2/15/78 rlb 23. MI N ORD: OSC to set aside S/J: ORD OSC dischrged & S/J reaffirmed; deft Boeing to sub memo re cert for interloc appeal by 1/14/79: defts mot to dsm s Denied & plf's mot to strk is Denied, flng Of S/J after dscvry will be allowed.
- 7/20/79 rlb 24. Fld sub & ORD sub Joseph T. Cook in place & stead of Theodore Orliss.
- 7/10/79 rlb 25. Fld plfs' cross ntc of tkng depos of Richard Nelson on 8/21/79 & Rocco Lippis on 8/28/79.
- 9-14-79 yd 26. Fld pltfs' opp to discov schedule & discov cut-off
- 7-14-80 dg Fld DEPOSITION of Richard W. Nelson on 8-22-79
- Fld Contd DEPOSITION of Richard W. Nelson of 8-21-79
- 7-19-80 sb Fld DEPOSITION of Richard W. Nelson tkn on 2-26-80
- 8-2-80 kt Fld pltfs' memo of law in spprt of mot by pltf Varig to file an A/C & for sanctions against deft U.S.
- Fld pltfs' stmt in spprt of mot by pltf Varig for sanctions for 1v to file an A/C & for 1v for discovery from the Boeing Co.
- Fld pltfs' aff of Joseph T. Cook & attached exhs
- 8/21/80 rz Fld pltfs Mascher et al's ntc of depos of Wes Slifer on 9/3/80; of Raleigh Curtis on 9/4/80; FAA Official in charge of or responsibl fr issuing Airworthiness Directives on the 707 aircraft & othrs during the year preceding the Varig crash or his successor on 9/15/80; of M. Craig Beard on 9/16/80

9-8-80	sb	Fld DEPOSITION of Richard W. Nelson tkn on 2-20-80 Fld DEPOSITION of Richard W. Nelson tkn on 12-4-79 Fld DEPOSITION of Richard W. Nelson tkn on 12-5-79
10/21/80	rz	Fld AUSA, U.S. memo in opp to pltfs Mascher, et al mot to amd complt
10-31-80	kt	Fld pltfs' ntc of mot, rtnbl 11-24-80, 10am Fld pltfs' mot to A/C LODGED pltf's prop A/C
11/6/80	rlb	Fld response of plfs' to memo of US in opp to mot to amnd emplt.
11/20/80	rlb	Fld stip & ORD cntg mot to amnd complt to 12/15/80, 2pm.
12/3/80	rlb	Fld stip for cont of USA's mot for S/J & for plf Maschers' mot for 1v to amnd & ORD thereon cntg mots to 1/26/81, 2pm.
12/17/80	rlb	Fld plfs' memo of law.
12/19/80	rlb	affd Cook.
1/7/81	rlb	39. Fld US' ntc of mot, rtnble 1/26/81, 2pm to strike. 40. Fld US' memo in suppt its' mot to strike. 41. Fld US' reply memo to plfs' opp to US' mot for S/J. 42. Fld US's mot to strike portions of affd of Cook III.
1/14/81	rlb	Fld DEPOSITIONS of Melvin Graig Beard, tkn 10/21/80.
1/22/81	rlb	Fld DEPOSITION of Weston B. Slifer, tkn 10/22/80 Fld DEPOSITION of Weston B. Slifer, tkn 10/23/80
2/4/81	lp	43. Fld pltf note of filing the takng depositn of Melvin Craig Beard takng on 10/21/80.
2-6-81	md	44. Fld Findings of Fact & concls of law (WPG) tht S/J will be ent in fav of deft United States of America. (ENT 3-9-81) Mld cpys & notes to prtys. 45. Fld ORD (WPG) for entry of S/J in fav of deft, United States of America and agnst

- pltfs Varig and Mascher, et al. (ENT 3-9-81)  
Mld epys & notes to prtys.
- |         |    |  |
|---------|----|--|
| 4/23/81 | 1p | 46. MIN ORD: (Nunc Pro Tunc—1/26/81).<br>ORD that pltfs' mot to amend the complnt is<br>Granted. |
| 5-8-81  | 1w | 47. Fld pltfs' NOTC OF APPEAL to 9th Cir<br>frm Ord ent 3-9-81                                   |

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 VARIG Airlines

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

*Civil Action No.*  
*CV 76-0187-WPG*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
 (VARIG AIRLINES), PLAINTIFF,

*v.*

THE UNITED STATES OF AMERICA, DEFENDANT

FIRST AMENDED COMPLAINT  
 FOR MONEY DAMAGES

COUNT I

1. Plaintiff, S.A. EMPRESA DE VIACAO AEREA RIO GRANDENS (VARIG AIRLINES) (hereinafter "VARIG") is a corporation incorporated under the laws of the Republic of the United States of Brazil, having its principal place of business in Rio de Janeiro, Brazil. As Brazil's international "flag" airline, VARIG flies its passenger-carrying aircraft into and out of the International Airport at Los Angeles, California, where it maintains offices and does business.

2. Plaintiff's claim against defendant UNITED STATES OF AMERICA (hereinafter "UNITED STATES") arises

under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b), 2671 *et seq.*, as hereinafter more fully appears.

3. At all times mentioned herein the United States Federal Aviation Administration or its predecessor the Civil Aeronautics Authority (hereinafter collectively referred to as the "FAA") was an agency of defendant UNITED STATES charged by law with the duty of promoting safety of flight of civil aircraft in air commerce by prescribing such minimum standards governing the design and performance of aircraft as may be required in the interests of safety. In furtherance of that duty the FAA was at all times mentioned herein empowered by law to issue type certificates for passenger-carrying aircraft such as the BOEING Model 707 jet transport (hereinafter "BOEING Model 707 type aircraft") and upon application for such a certificate by aircraft manufacturers such as THE BOEING COMPANY (hereinafter "BOEING") the FAA was charged by law with the duty of reviewing the applicant's designs, drawings, tests, analyses, and aircraft and its component parts for the purpose of ascertaining whether the applicant's aircraft complied with the applicable Civil Air Regulations and/or Federal Aviation Regulations (hereinafter collectively referred to as "FARs") and other standards governing the design and performance of aircraft prescribed by the FAA; and with the further duty of making, or requiring the applicant to make, such tests during manufacture and upon completion of the aircraft as the FAA deemed reasonably necessary in the interests of safety, including flight tests and tests of any part of such aircraft.

4. At all times herein mentioned the FAA acted by and through its officers, agents and employees, who were at all times mentioned herein acting under color of their office, within the scope and course of their employment, and on behalf of a federal agency in an official capacity as employees of defendant UNITED STATES.

5. Prior to July 11, 1973, BOEING and WALTER KIDDE & COMPANY, INC. (hereinafter "KIDDE") designed, tested, manufactured and sold a BOEING 707-320-C passenger-carrying transport jet aircraft, serial number 19841; and prior to said date, plaintiff VARIG pur-

chased said aircraft from Seaboard World Airlines, Inc. and operated it as Registration No. PP-VJZ (hereinafter said aircraft is referred to as "PP-VJZ").

6. Prior to July 11, 1973, BOEING made application to the FAA's Western Region in Los Angeles, California, for a type certificate for the BOEING Model 707 type aircraft, which certificate was issued by the FAA's Western Region prior to said date.

7. Prior to July 11, 1973, in California and elsewhere in the United States, the defendant UNITED STATES, through its agency the FAA, negligently and carelessly issued a type certificate for the BOEING Model 707 type aircraft, which aircraft the FAA knew or should have known did not comply with the FARs and other minimum standards governing the design and performance of passenger-carrying aircraft, and which aircraft the FAA knew or should have known had defects and dangers in its design and manufacture; negligently and carelessly failed to review and inspect BOEING's and KIDDE's designs, drawings, tests, analyses, and aircraft and its components for the purpose of ascertaining whether the Model 707 type aircraft complied with the applicable FARs and aforementioned minimum standards governing the design and performance of passenger-carrying aircraft; negligently and carelessly failed to make, or failed to require BOEING and KIDDE to make, such tests during the manufacture and upon completion of the BOEING Model 707 type aircraft, including PP-VJZ, as were necessary in the interests of safety; negligently and carelessly failed to require BOEING and KIDDE to modify or alter the design and manufacture of the BOEING Model 707 type aircraft, including PP-VJZ, prior to July 11, 1973, when it knew or reasonably should have known that said aircraft was defective, dangerous and not in compliance with the FARs and aforementioned minimum standards, governing the design and performance of passenger-carrying aircraft; and negligently and carelessly failed to notify and/or warn operators and users of BOEING Model 707 type aircraft, including VARIG, prior to July 11, 1973, through the issuance of



Airworthiness Directives ("hereinafter "ADs"), or otherwise of the defects and dangers in said aircraft, including PP-VJZ, of which defects and dangers the FAA knew or should have known.

8. As a proximate result of the negligence of the defendant UNITED STATES as alleged, on July 11, 1973, PP-VJZ crash-landed near Paris, France following an in-flight fire in the aircraft which became uncontrollable.

9. As a proximate result of this negligence PP-VJZ was totally destroyed, all to the plaintiff's damage in the sum of SIX MILLION DOLLARS (\$6,000,000.00).

WHEREOF, VARIG prays judgment as hereinafter set forth.

## COUNT II

10. VARIG repeats and realleges each and every allegation contained in paragraphs 1, 2, 4, 5 and 6 of Count I of the First Amended Complaint, as if set forth in full herein.

11. At all times herein mentioned the UNITED STATES undertook to certify civil aircraft in air commerce, including the BOEING Model 707 type aircraft, as airworthy and in compliance with the applicable FARs and such minimum standards governing the design, manufacture and performance of aircraft as were required in the interests of safety. In furtherance of that undertaking the UNITED STATES, through its agency the FAA and its employees and designated representatives, issued Type Certificates and Certificates of Airworthiness to aircraft designers and manufacturers including BOEING, for civil aircraft in air commerce, including the BOEING Model 707 type aircraft and PP-VJZ, upon application for such certificates by manufacturers, including BOEING. Following such application the FAA, its employees and designated representatives, undertook to review and inspect the applicant's designs, drawings, tests, analyses and aircraft, including its component parts, for compliance with applicable FARs and the aforesaid minimum standards. In addition, the FAA, its employees and designated representatives undertook to require the applicants, including BOEING, to make such tests, including flight tests, of passenger-carrying aircraft,

including the BOEING 707 type aircraft, as were required in the interests of safety and to show compliance with the applicable FARs and the aforesaid minimum standards. The FAA further undertook to review the in-service operating and safety experience of aircraft which had been issued the aforesaid certificates, including the BOEING Model 707 type aircraft, after their delivery to operators, including VARIG, for the purpose of discovering said dangers and defects; to determine the continuing safety and airworthiness of such aircraft; and to warn all operators of such aircraft of all such dangers and defects and of the means or methods of correcting or minimizing them. In furtherance of that undertaking the FAA issued ADs and other communications to operators of such aircraft during the operating life of the aircraft.

12. Prior to July 11, 1973, operators and users of BOEING Model 707 type aircraft, including VARIG, reasonably relied on the FAA's various undertakings described above, including but not limited to the issuance of type certificates, certificates of airworthiness and ADs for the BOEING Model 707 type aircraft, including PP-VJZ, and the FAA was aware of such reliance.

13. Prior to July 11, 1973, in California and elsewhere in the UNITED STATES, the defendant UNITED STATES, through its agency the FAA, negligently and carelessly issued a type certificate for the BOEING Model 707 type aircraft, which aircraft the FAA knew or should have known did not comply with the applicable FARs and other minimum standards governing the design and performance of passenger-carrying aircraft, and which aircraft the FAA knew or should have known had defects and dangers in its design and manufacture; negligently and carelessly failed to review and inspect BOEING's and KIDDE's designs, drawings, tests, analyses, and aircraft and its components for the purpose of ascertaining whether the BOEING Model 707 type aircraft complied with the applicable FARs and the aforementioned minimum standards governing the design and performance of passenger-carrying aircraft; negligently and carelessly failed to make, or failed to require BOEING and KIDDE to make, such tests during the man-

ufacture and upon completion of the BOEING Model 707 type aircraft, including PP-VJZ, as were necessary in the interests of safety; negligently and carelessly failed to require BOEING and KIDDE to modify or alter the design and manufacture of the BOEING Model 707 type aircraft, including PP-VJZ, prior to July 11, 1973, when it knew or reasonably should have known that said aircraft was defective, dangerous and not in compliance with the applicable FARs and aforementioned minimum standards, governing the design and performance of passenger-carrying aircraft; and negligently and carelessly failed to notify and/or warn operators and users of BOEING Model 707 type aircraft, including VARIG, prior to July 11, 1973, through the issuance of ADs or otherwise of the defects and dangers in said aircraft, including PP-VJZ, of which defects and dangers the FAA knew or should have known.

14. As a proximate result of the negligence of the defendant UNITED STATES as alleged, the risk of harm to users and operators of BOEING Model 707 type aircraft, including VARIG, was increased.

15. As a proximate result of the negligence of the defendant UNITED STATES as alleged, on July 11, 1973, PP-VJZ crash-landed near Paris, France, following an in-flight fire in the aircraft which became uncontrollable.

16. As a proximate result of defendant UNITED STATES' negligence as alleged, PP-VJZ was totally destroyed, all to plaintiff's damage in the sum of SIX MILLION DOLLARS (\$6,000,000.00).

WHEREOF, VARIG demands judgment against the UNITED STATES in the sum of SIX MILLION DOLLARS (\$6,000,000.00), for interest, for the costs of this action, and for all other proper relief.

Dated:

SHAW, PITTMAN, POTTS & TROWBRIDGE  
1800 M Street, N.W.  
Washington, D.C. 20036  
Telephone: (202) 331-4100

/s/

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.  
CV 76-0187-WPG

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

ANSWER OF DEFENDANT, UNITED STATES OF  
AMERICA TO FIRST AMENDED COMPLAINT FOR  
MONEY DAMAGES

Defendant, United States of America, by its attorneys, ANDREA SHERIDAN ORDIN, United States Attorney for the Central District of California, and CECILE HATFIELD, Trial Attorney, United States Department of Justice, Washington, D.C., in answer to the Complaint for Money Damages as filed herein states as follows:

COUNT I

1. The United States of America is without sufficient knowledge and information to form an opinion as to the

truth of the allegations contained in Paragraph 1 of the Complaint, but for the purposes of this Answer, they are denied.

2. The allegations contained in Paragraph 2 of the Complaint present questions of law which are respectfully referred to this Honorable Court for determination.

3. The allegations contained in Paragraph 3 of the Complaint present questions of law which are respectfully referred to this Honorable Court for determination.

4. The United States of America is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraph 4 of the Complaint, but for the purpose of this Answer, they are denied.

5. The United States of America is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraph 5 of the Complaint, but for the purpose of this Answer, they are denied.

6. The United States of America admits the allegations contained in Paragraph 6 of the Complaint.

7. The United States of America denies each and every allegation contained in Paragraph 7 of the Complaint.

8. The United States of America denies each and every allegation contained in Paragraph 8 of the Complaint.

9. The United States of America denies each and every allegation contained in Paragraph 9 of the Complaint.

## COUNT II

10. The United States of America repeats and reaffirms each and every answer to Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Count I of the First Amended Complaint, as if set forth in full herein.

11. The United States of America denies each and every allegation contained in Paragraph 11 of the Complaint.

12. The United States of America denies each and every allegation contained in Paragraph 12 of the Complaint.

13. The United States of America denies each and every allegation contained in Paragraph 13 of the Complaint.

14. The United States of America denies each and every allegation contained in Paragraph 14 of the Complaint.

15. The United States of America denies each and every allegation contained in Paragraph 15 of the Complaint.

16. The United States of America denies each and every allegation contained in Paragraph 16 of the Complaint.

## AFFIRMATIVE DEFENSES

### FIRST DEFENSE

17. The Complaint fails to state a cause of action.

### SECOND DEFENSE

18. This Honorable Court lacks jurisdiction pursuant to the provisions of 28 U.S.C. Section 2680(a), (h) and (k).

### THIRD DEFENSE

19. No negligent or wrongful act of any agent and/or employee of the United States of America acting within the scope of his employment in any way caused or contributed to the happening of the subject accident.

### FOURTH DEFENSE

20. The injury suffered herein by the Plaintiff was due to the negligence of the Plaintiff herein acting by and through its agents and/or employees.

WHEREFORE, Defendant, United States of America, demands dismissal of the Complaint herein and for such other, further and different relief which to the Court may be just and proper.

Respectfully submitted,

**ALICE DANIEL**

*Assistant Attorney General  
Civil Division*

**ANDREA SHERIDAN ORDIN**

*United States Attorney*

**JAMES STOTTER, II**

*Assistant United States Attorney*

**GARY W. ALLEN**

*Assistant Director  
Torts Branch, Civil Division*



By: /s/

---

CECILE HATFIELD*Trial Attorney**Torts Branch, Civil Division**U.S. Department of Justice**P.O. Box 14271**Washington, D.C. 20044**Telephone: 202-724-7333*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 78 0914

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA,  
RAYMOND ROSA, BRUNO ROSA, CORIDO ROSA, AND ERNEST  
ROSA, INDIVIDUALLY AND AS HEIRS AND LEGATEES OF ELIO  
ROSA, DECEASED, ET AL. PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT FOR WRONGFUL DEATH

Plaintiffs, through their attorneys, SMILEY & LEAR,  
P.C., SPEISER & KRAUSE, P.C. and SPEISER,  
KRAUSE & MADOLE, respectfully allege as follows:

I.

That pursuant to the Federal Tort Claims Act, 28 U.S.C.  
§§ 1346(b) and 2671-2680, et al., the plaintiffs bring this ac-  
tion for wrongful death.

II.

That on or about July 10, 1975, administrative claims  
were filed, pursuant to the provisions of 28 U.S.C.  
§2675(a), with the Department of Transportation, Federal  
Aviation Administration, and other related governmental  
agencies. On October 18, 1977, these claims were denied.  
Therefore, pursuant to the provisions of 28 U.S.C.  
§§ 1346(b) and 2675(a), the present action is brought.

III.

That defendant operates the Department of Transporta-  
tion and the Federal Aviation Administration, with head-  
quarters in Washington, D.C. and related subdivisions lo-  
cated in this district, and that the negligence described in  
Paragraphs XIII through XVII, inclusive below, occurred  
in the Western Region of the Federal Aviation Administra-  
tion, in Los Angeles, California, within this judicial dis-  
trict, as well as in Washington, D.C.

## IV.

That this Court has jurisdiction over the parties and the subject matter based on the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, *et seq.*

## V.

That at all times relevant hereto, the principal business of the Boeing Company (hereinafter referred to as "Boeing") within the United States was and is the planning, design, manufacture, assembly, testing, modification, servicing, inspection and sale of various types of aircraft, including the Boeing 707 aircraft, and the component parts, equipment, systems and accessories thereof, and manuals and training devices pertaining thereto.

## VI.

That prior to July 11, 1973, Boeing planned, designed, manufactured, assembled, tested, serviced and inspected, within the United States a Boeing 707-320C aircraft, serial number 19841 (hereinafter referred to as the "subject aircraft"), including the component parts, equipment, systems and accessories thereof, and the manuals and training devices pertaining thereto, and the subject aircraft was thereafter sold and delivered to SEABOARD WORLD AIRLINES INC., (hereinafter referred to as "Seaboard") for use as a common carrier of passengers and property for hire.

## VII.

That prior to the sale of the subject aircraft to Seaboard, the aircraft, including its component parts, equipment, systems and accessories thereof, were inspected and certified as being safe and suitable for public use by the defendant, through its employees and agents, acting within the scope of their employment.

## VIII.

That prior to July 11, 1973, the subject aircraft was purchased from Seaboard by S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE, a Brazilian corporation trad-

ing as VARIG AIRLINES (hereinafter referred to as "Varig") for use as a common carrier of passengers and property for hire.

#### IX.

That on July 11, 1973, the subject aircraft was operated by Varig on a regular scheduled international flight between Rio de Janeiro, Brazil, and Orly Airport, France, carrying 117 fare-paying passengers.

#### X.

That on July 11, 1973, as the subject aircraft approached Orly Airport, France, a fire broke out in the vicinity of a lavatory in the aft section of the subject aircraft, causing various materials used in the fuselage and interior furnishings and upholstery of the aircraft to burn and emit dangerous and poisonous gases and fumes, resulting in death by asphyxiation to plaintiffs' decedents.

#### XI.

That on and prior to July 11, 1973, pursuant to the Federal Aviation Act, defendant United States of America by and through the Administrator of the Federal Aviation Administration and its employees and agents, acting within the scope of their employment, exercised a non-delegable duty to issue such minimum standards governing the design, materials, workmanship, and construction of civil aircraft as was necessary to promote the safety of such aircraft in air commerce, including international air commerce.

#### XII.

That prior to July 11, 1973, employees and agents of the defendant United States, exercised a non-delegable duty to exercise reasonable care in the formulation, issuance, publication, notification and enforcement of minimum standards governing the design, materials, workmanship and construction of aircraft intended to be employed in air commerce including international air commerce as well as a non-delegable duty to warn operators of and passengers in

such aircraft of any dangers inherent in said design, materials, workmanship and construction.

### XIII.

That prior to July 11, 1973, the defendant, by and through the Administrator of the Federal Aviation Administration and its employees and agents negligently issued minimum standards relating to the flammability of materials used in the interior of civil aircraft including the Boeing 707 aircraft.

### XIV.

That prior to July 11, 1973, the defendant, by and through the Administrator of the Federal Aviation Administration and its employees and agents, acting within the scope of their employment, negligently failed to issue minimum standards relating to the toxicity of materials in the interior of civil aircraft including Boeing 707 aircraft.

### XV.

That prior to July 11, 1973, the defendant, by and through the Administrator of the Federal Aviation Administration and its employees and agents, acting within the scope of their employment, negligently certificated the interior design of the Boeing 707 type aircraft, including but not limited to, the lavatories thereof, the air conditioning and pressurization system thereof, the oxygen system thereof, the smoke evacuation system thereof, and the manuals and instructions pertaining thereto.

### XVI.

That prior to July 11, 1973, the defendant, by and through the Administrator of the Federal Aviation Administration and its employees and agents, acting within the scope of their employment, negligently certificated the production of the subject aircraft, and following its production, negligently issued an airworthiness certificate relating thereto.

### XVII.

That prior to July 11, 1973, the defendant, by and through the Administrator of the Federal Aviation Admin-

istration and its employees and agents, acting within the scope of their employment, negligently failed to warn operators of said aircraft and the flying public including plaintiffs' decedents herein, of the dangers inherent in the interior design of the Boeing 707 aircraft, all of which was well known to defendant.

#### XVIII.

That the aforesaid negligence of the defendant, by and through its employees and agents, acting within the scope of their employment, was in breach of duties imposed by the Federal Aviation Act, the Civil Air Regulations, the Federal Aviation Regulations, and the common law duty to exercise reasonable care in the premises.

#### XIX.

That the death of plaintiffs' decedents aboard the subject aircraft on July 11, 1973, was proximately caused by the negligent breach on the part of the defendant of its continuing, nondelegable duties described above.

#### XX.

That as a direct and proximate result of the defendant's negligent and wrongful conduct in the premises, plaintiffs have sustained pecuniary damages, including loss of support, services, counsel, society, companionship, consortium, care, nurture, training, the prospect of inheritance of future accumulations, and other damages, including grief and moral damages.

#### XXI.

That as a direct and proximate result of the defendant's negligent and wrongful conduct in the premises, each of the passengers aboard the subject aircraft suffered great physical pain and mental anguish in contemplation of impending disaster and death, personal injuries and property loss. As a result, the estate of each of the plaintiffs' decedents has sustained these and other damages.

#### XXII.

That by reason of all the foregoing, plaintiffs Emma Rosa Mascher, Alfred Rosa, Guido Rosa, Raymond Rosa, Bruno

Rosa, Corido Rosa, and Ernest Rosa have been damaged in the sum of Two Million Two Hundred Seventy Thousand (\$2,270,000.00) Dollars; plaintiffs Honor Christine Brogan and Thomas James Patrick Brogan have been damaged in the sum of Three Million Five Hundred Thousand (\$3,500,000.00) Dollars; plaintiffs Antoine Marie Rulhe and Denise Louise Rulhe have been damaged in the sum of One Million Four Hundred Seventy-Five Thousand (\$1,475,000.00) Dollars; plaintiffs Claude Marie-Josephe Arnaud Lavaud, Francois Jerome Gabriel Lavaud, Sophie Claude Marie Lavaud, Philippe Jean Marie Lavaud, Brigitte Lavaud Pasteyer, and Catherine Christiane Elisabeth Lavaud have been damaged in the sum of Five Million Two Hundred Thousand (\$5,200,000.00) Dollars; plaintiffs Shri Prithi Singh and Ranjeeta Prithi Singh have been damaged in the sum of One Million One Hundred Eighty Thousand (\$1,180,000.00) Dollars; plaintiffs Dirce Baratella in Dainelli, Albertina Dainelli, Ugo Dainelli, Ornella Dainelli in Allegri, and Regina Dainelli in Pisano, have been damaged in the sum of One Million Two Hundred Twenty Thousand (\$1,220,000.00) Dollars; plaintiffs Zelia Rivetto Griglio and Sergio Griglio have been damaged in the sum of Two Million Six Hundred Thousand (\$2,600,000.00) Dollars; plaintiffs Francesca Griglio Bongiovanni, Fernanda Bongiovanni and Alberto Bongiovanni have been damaged in the sum of Two Million Nine Hundred Ten Thousand (\$2,910,000.00) Dollars; plaintiff Ubaldo Zanardi has been damaged in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars; plaintiffs Maria Lucia Bruder, Thomas Bruder and Georgia Bruder have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Halim Aidar Junior, Cristina Berriel Aidar and Claudia Berriel Aidar have been damaged in the sum of One Million Seven Hundred Fifty Thousand (\$1,750,000.00) Dollars; plaintiff Ana Lucia Teixeira de Andrade Figueira has been damaged in the sum of Two Million (\$2,000,000.00) Dollars; plaintiffs Palmira de Oliveira Judice, Zulmira de Oliveira Homem de Mello, Amalia da Cunha e Oliveira, Thereza Cunha de Souza Andrade, Alexandrina de Oliveira Dalmaso, Elio



Afonso da Cunha, Selene da Cunha Moraes, Eros Afonso da Cunha, Terezinha Afonso da Cunha and Antonio Afonso da Cunha have been damaged in the sum of One Million (\$1,000,000.00) Dollars; plaintiffs Geni Nilsa Diefenthaler, Iignes Diefenthaler, Carla Diefenthaler, Agnes Diefenthaler, and Marcos Diefenthaler have been damaged in the sum of Two Million (\$2,000,000.00) Dollars; plaintiffs Marcienne Chabrerat Mas, Christian Mas, and Joelle Mas Gros have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Anna Bernstrom Fauconnier, Peter Fauconnier and Mathias Fauconnier have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Pierre Sarda, Michel Sarda, Alain Sarda and Nicole Sarda de Claviere d'Hust have been damaged in the sum of One Million (\$1,000,000.00) Dollars; plaintiffs Maddy Marie Dietrich Aufrere de la Preugne, Solange Aufrere de la Preugne, Isabelle Aufrere de la Preugne, and Anne Marie Aufrere de la Preugne have been damaged in the sum of Three Million (\$3,000,000.00) Dollars; plaintiffs Lucienne Dando Tardif, Gerard Tardif and Claire Tardif Marette have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Jacqueline Dubois Fardel, Doris-Marie Fardel and Nicole-Suzanne Fardel have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Danielle Cojan Ghorbanian, Pascal Karim Ghorbanian and Philippe Guive Ghorbanian have been damaged in the sum of Two Million Six Hundred Thousand (\$2,600,000.00) Dollars; plaintiffs Marie Sieber-Tschirky, Valentin Sieber, Hedwig Graf-Sieber and Rose-Marie Sieber have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Maria Neusa Consoni Guimaraes, Cristina Lonsoni Guimaraes, Ana Luiza Consoni Guimaraes, Silvia Consoni Guimaraes, Luiz Humberto Guimaraes, and Elza Helena Consoni Guimaraes have been damaged in the sum of Two Million (\$2,000,000.00) Dollars; plaintiff Charlotte Danzberg has been damaged in the sum of Five Hundred Thousand (\$500,000.00) Dollars; plaintiffs Egon Erny Kirst and Nelly

Ebling Kirst have been damaged in the sum of Seven Hundred Fifty Thousand (\$750,000.00) Dollars; plaintiff Maria Reginato Paganella has been damaged in the sum of Five Hundred Thousand (\$500,000.00) Dollars; plaintiffs Clara Zimmerman de Peluffo, Santiago Peluffo, Veronica Peluffo, Agustina Peluffo and Josefina Peluffo have been damaged in the sum of Two Million (\$2,000,000.00) Dollars; plaintiff Enilda Fernandez de Sortino has been damaged in the sum of Eight Hundred Thousand (\$800,000.00) Dollars; plaintiffs Suzanne Seve Jacquot, Christophe Jacquot, Denis Jacquot, and Charlotte Jacquot have been damaged in the sum of Two Million Four Hundred Fifty Thousand (\$2,450,000.00) Dollars; plaintiff Emese Hegedus has been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiff Maria Roth has been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Margit Tarnay, Tunde Tarnay, and Laszlo Tarnay have been damaged in the sum of Two Million Six Hundred Fifty Thousand (\$2,650,000.00) Dollars; plaintiffs Felix Gutierrez Acuna and Maria Mercedes Gutierrez Acuna have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Maria Luiza Pereira de Almeida Leite Ribeiro, Patricia Leite Ribeiro, and Maria Fernanda Leite Ribeiro have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Marina Menezes de Oliveira Carvalho and Sergio Menezes de Oliveira Carvalho have been damaged in the sum of Three Million Five Hundred Thousand (\$3,500,000.00) Dollars; plaintiffs Magdalena de Auge, Enrique Auge and Juan Claudio Auge have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Myriam Collier de Lamare, Guilherme de Lamare and Claudia de Lamare have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Jose Narciso da Fonseca e Silva and Isis Souza da Fonseca e Silva have been damaged in the sum of Seven Hundred Fifty Thousand (\$750,000.00) Dollars; plaintiffs Geraldo Gouvea Carrazedo and Celina Correa Carrazedo have been damaged in the sum of Five Hundred Thousand

(\$500,000.00) Dollars; plaintiffs Claudia de Souza Weiss, Fabria de Souza Scavone and Alexei Scavone have been damaged in the sum of Nine Hundred Fifty Thousand (\$950,000.00) Dollars; plaintiffs Walkiria di Vizio Silvana di Vizio, Eduardo di Vizio and Claudia di Vizio have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiff Paulina Knijnik has been damaged in the sum of Five Hundred Thousand (\$500,000.00) Dollars; plaintiffs Amal Veron Yglesias, Raul Yglesias and Elis Aparecida Yglesias have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Moise Daurier, Louis Daurier, Jeanne Daurier, Andre Daurier, Albert Daurier, Georges Daurier, Victor Daurier, Marie Daurier, Yvette Meyer, Helene Barnaud, and Paulette Haro have been damaged in the sum of Two Million Three Hundred Thousand (\$2,300,000.00) Dollars; plaintiffs Hildegard Juesten, Dr. Ulrich Juesten and Dr. Wolfgang Juesten have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Nancy Palleta dos Santos, Augustinho dos Santos Junior and Airton Palleta dos Santos have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Luciana Zavaroni and Francesca Zavaroni have been damaged in the sum of Two Million Five Hundred Thousand (\$2,500,000.00) Dollars; plaintiffs Monika Colli, Sven Colli, and Tanja Colli have been damaged in the sum of Two Million (\$2,000,000.00) Dollars; plaintiffs Francisca Arlita Barbosa Quindere, Paulo Barbosa Quindere, Renata Barbosa Quindere, Adriana Barbosa Quindere, Cristina Barbosa Quindere and Luciana Barbosa Quindere have been damaged in the sum of Three Million (\$3,000,000.00) Dollars; plaintiffs Cornelia Koeman-Nieuweborer, Maartje Grietje Koeman, Klaas Evert Koeman and Martin Dik Koeman have been damaged in the sum of Three Million (\$3,000,000.00) Dollars; plaintiffs Luiz Tiellet, Rivadavia Tiellet, Aristotelino Tiellet, Eloah Tiellet da Silva, Luiza de Lourdes Tiellet Oliveira Hilda Alvares, Celanira Tiellet Borges, Therezinha Tiellet Bueno and Dolores Velloso Vianna have been damaged in the sum of Four Million

(\$4,000,000.00) Dollars; plaintiffs Waldemar Martins Ferreira Filho, Waldemar Ferreira Netto, Ana Maria Martins Ferreira and Maria Antonieta Martins Ferreira have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars; plaintiffs Maria Isabel Malta Cardozo Barretto Prado, Evangelina Malta Cardozo Junqueira de Aquino, Carlota Josephina Malta Cardozo dos Reis Boto, Francisco Malta Cardozo Neto, Anna Maria Martins Ferreira, Maria Antonieta Martins Ferreira, and Waldemar Ferreira Netto have been damaged in the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars.

WHEREFORE, the plaintiffs demand judgment against the defendant, United States of America, in the total sum of One Hundred Million, Six Hundred Five Thousand (\$100,605,000.00) Dollars, and each of them individually demands judgment as set forth more particularly in paragraph XXII of this Complaint, incorporated herein by reference, together with interest thereon, and the costs and disbursements of this action.

SMILEY & LEAR, P.C.

*1819 H Street, N.W., Suite 500*

*Washington, D.C. 20006*

*Telephone: (202) 466-8171*

/s/

ROBERT R. SMILEY, III

SPEISER & KRAUSE, P.C.

*200 Park Avenue*

*New York, New York 10017*

*Telephone: (212) 661-0011*

/s/

CHARLES F. KRAUSE

SPEISER, KRAUSE & MADOLE

*1216 Sixteenth Street, N.W.*

*Washington, D.C. 20036*

*Telephone: (202) 223-8501*

/s/

DONALD W. MADOLE

OF COUNSEL:

BERRIS & SETON

*1801 Century Park East*  
*Los Angeles, California 90067*

By: /s/ \_\_\_\_\_  
TED ORLISS

# CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Prepare in ink or typewriter. Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary.

OM and B  
Approval No.  
90-R111

1. SUBMIT TO: Federal Aviation Administration 800 Independence Avenue, S.W. Washington, D.C. 20591			2. NAME AND ADDRESS OF CLAIMANT (Number, street, city, State, and Zip Code)		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN	4. AGE	5. MARITAL STATUS	6. NAME AND ADDRESS OF SPOUSE, IF ANY (Number, street, city, State, and Zip Code)		
7. PLACE OF ACCIDENT (Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town)  Saulx les Chartreux, France			8. DATE AND DAY OF ACCIDENT  11 July 1973		9. TIME (A.M OR P.M.)  1358 GMT
10. AMOUNT OF CLAIM (in dollars)					
A. PROPERTY DAMAGE		B. PERSONAL INJURY		C. WRONGFUL DEATH	
D. TOTAL					
11. DESCRIPTION OF ACCIDENT (State below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof) Claimants decedent died as a result of inhalation of smoke & toxic gases emitted by a fire which burned out of control in the lavatory of that certain Boeing 707 aircraft bearing Brazilian registry PP-VJZ, manufacturer's serial No. 19841 on July 11, 1973. Conditions producing the fire were proximately caused by the negligence of agents of the F.A.A. in the issuance of type, production & airworthiness certificates relating to said aircraft.					
12. PROPERTY DAMAGE					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)					
BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE (See instructions on reverse side for method of substantiating claim)					
13. PERSONAL INJURY					
STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM					
14. WITNESSES					
NAME			ADDRESS (Number, street, city, State, and Zip Code)		
Capt. Gilberto Arango da Silva 2d Officer Alvio Basso Engineer Claunor Bello Steward Luis Coelho <del>Stewardess Andrea Pina</del>			c/o Varig Airlines Rio de Janeiro Brazil		
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM					
15. SIGNATURE OF CLAIMANT (This signature should be used in all future correspondence)				16. DATE OF CLAIM	
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM  The claimant shall forfeit and pay to the United States the sum of \$2,000, plus double the amount of damages sustained by the United States. (See R.S. §3490, 5438; 31 U.S.C. 231.)			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS  Fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (See 62 Stat. 698, 749; 18 U.S.C. 287, 1001.)		

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 78-0914

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA,  
RAYMOND ROSA, BRUNO ROSA, CORIDO ROSA, AND ERNEST  
ROSA, INDIVIDUALLY AND AS HEIRS AND LEGATEES OF ELIO  
ROSA, DECEASED, ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

DEFENDANT UNITED STATES OF AMERICA'S  
ANSWER TO COMPLAINT

I.

The allegations contained in paragraph I of plaintiffs' complaint presents a question of law which is respectfully referred to the Court for its determination.

II.

Defendant United States of America admits that administrative claims were filed with the Department of Transportation, Federal Aviation Administration, and that these claims were denied.

III.

Defendant United States of America denies each and every allegation contained in paragraph III of plaintiffs' complaint.

IV.

The allegations contained in paragraph IV of plaintiffs' complaint presents a question of law which is respectfully referred to the Court for its determination.

V.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to



the truth of the allegations contained in paragraph V of plaintiffs' complaint.

VI.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph VI of plaintiffs' complaint.

VII.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph VII of plaintiffs' complaint.

VIII.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph VIII of plaintiffs' complaint.

IX.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to the truth of the allegation contained in paragraph IX of plaintiffs' complaint.

X.

Defendant United States of America has insufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph X of plaintiffs' complaint.

XI.

Defendant United States of America denies each and every allegation contained in paragraph XI of plaintiffs' complaint.

XII.

Defendant United States of America denies each and every allegation contained in paragraph XII of plaintiffs' complaint.

## XIII.

Defendant United States of America denies each and every allegation contained in paragraph XIII of plaintiffs' complaint.

## XIV.

Defendant United States of America denies each and every allegation contained in paragraph XIV of plaintiffs' complaint.

## XV.

Defendant United States of America denies each and every allegation contained in paragraph XV of plaintiffs' complaint.

## XVI.

Defendant United States of America denies each and every allegation contained in paragraph XVI of plaintiffs' complaint.

## XVII.

Defendant United States of America denies each and every allegation contained in paragraph XVII of plaintiffs' complaint.

## XVIII.

Defendant United States of America denies each and every allegation contained in paragraph XVIII of plaintiffs' complaint.

## XIX.

Defendant United States of America denies each and every allegation contained in paragraph XIX of plaintiffs' complaint.

## XX.

Defendant United States of America denies each and every allegation contained in paragraph XX of plaintiffs' complaint.

## XXI

Defendant United States of America denies each and every allegation contained in paragraph XXI of plaintiffs' complaint.

**XXII.**

Defendant United States of America denies each and every allegation contained in paragraph XXII of plaintiffs' complaint.

**AFFIRMATIVE DEFENSES**

As and for its affirmative defenses the United States of America asserts as follows:

**XXIII.****FIRST AFFIRMATIVE DEFENSE**

Plaintiff failed to state a claim upon which relief can be granted against this defendant.

**XXIV.****SECOND AFFIRMATIVE DEFENSE**

Defendant United States of America and its agencies and employees exercised due care and diligence in all matters alleged in the complaint herein and no act or failure to act of this defendant or any agency or employee of this defendant was the proximate cause of any damage, loss or injury to plaintiff.

**XXV.****THIRD AFFIRMATIVE DEFENSE**

This Court lacks jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §2680(a)(h) and (k).

**XXVI.****FOURTH AFFIRMATIVE DEFENSE**

No cause of action lies against the United States for the promulgation of minimum regulatory standards.

**XXVII.****FIFTH AFFIRMATIVE DEFENSE**

No cause of action lies against the United States for the certification of aircraft.

WHEREFORE, Defendant, United States of America, demands that the Complaint herein be dismissed as against it, together with all appropriate costs, fees and expenses and for such other and further relief as the Court may deem just and proper.

ANDREA SHERIDAN ORDIN  
*United States Attorney*

/s/

---

WILLIAM D. BLAKELY  
*Trial Attorney*  
*Aviation Section, Civil Division*  
*U.S. Department of Justice*  
*Washington, D.C. 20530*  
*202-739-4309*

*Of Counsel:*

JOHN R. HARRISON  
*Assistant Chief Counsel*

GARY W. ALLEN  
*Attorney*  
*Federal Aviation Administration*  
*U.S. Department of Transportation*  
*Washington, D.C. 20591*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant's Answer To Complaint was mailed this 16th day of May, 1978, to:

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/s/ \_\_\_\_\_  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Case NO. CV-78-0914-WPG

EMMA ROSA MASCHER; ALFRED ROSA; GUIDO ROSA;  
RAYMOND ROSA; BRUNO ROSA; CORIDO ROSA; AND ERNEST  
ROSAD, INDIVIDUALLY AND AS HEIRS AND LEGATEES OF  
EILO ROSA, DECEASED, ET AL., PLAINTIFFS,

v.

DEFENDANT

PLAINTIFFS MASCHER ET AL.'S FIRST AMENDED  
COMPLAINT FOR WRONGFUL DEATH, SECOND COUNT

Plaintiffs, through their undersigned attorneys Timothy J. Cook, Robert R. Smiley, Speiser and Krause P.C. and Speiser, Krause and Madole, amending their complaint to add a second Cause of Action against defendant United States of America allege as follows:

I

Plaintiffs incorporate by reference, paragraphs I-X, XIII-XVII, XXI and XXII of the Complaint herein filed on March 9, 1980 as if fully restated herein.

## XXIII

That on and prior to July 11, 1973, pursuant to the Federal Aviation Act, defendant United States of America by and through the Administrator of the Federal Aviation Administration and its employees and agents, acting within the scope of their employment, undertook to issue such minimum standards governing the design, materials, workmanship, and construction of civil aircraft as was necessary to promote the safety of passengers of such aircraft in air commerce, including international air commerce, thereby inducing reliance on such activities by the airlines and passengers alike.

## XXIV

Prior to July 11, 1973, pursuant to certain bilateral agreements between the United States of America and the Government of Brazil, and in reliance upon certain inspections of the subject aircraft allegedly conducted by employees of the Federal Aviation Administration or its predecessor agency, the Government of Brazil certified the subject aircraft as airworthy.

## XXV

Agents of the Federal Aviation Administration or its predecessor agency negligently failed to make inspections which the said agency undertook to make, or in the alternative, conducted said inspections negligently.

## XXVI

That as a direct and proximate result of the defendant's negligent inspection, or failure to inspect, plaintiffs have sustained pecuniary damages, including loss of support, services, counsel, society, companionship, consortium, care, nurture, training, the prospect of inheritance of future accumulations, and other damages, including grief and moral damages, as more particularly appears in paragraph XX of the complaint.

## XXVII

That as a direct and proximate result of the defendant's negligent inspection or failure to inspect, each of the pas-



sengers aboard the subject aircraft suffered great physical pain and mental anguish in contemplation of impending disaster and death, personal injuries and property loss. As a result, the estate of each of the plaintiffs' decedents has sustained these and other damages, as more particularly appears in paragraph XXI of the complaint.

### XXVIII

That the aforesaid acts or omissions of the defendant, by and through its employees and agents, acting within the scope of their employment, was in breach of duties arising from the undertaking of inspection which, if negligently performed or omitted, increased the risk of harm to plaintiffs and their decedents.

### XXIX

That the aforesaid acts or omission of the defendant, by and through its employees and agents, acting within the scope of their employment:

1. were undertaken to protect the safety of aircraft and passengers in air commerce, including international air commerce;
2. proximately caused a cabin fire which was a clearly foreseeable result of a failure to inspect, or a negligent inspection;
3. were the direct proximate causes of the deaths of plaintiffs' decedents;
5. was clearly contrary to the explicit safety policies of air commerce of the United States and the international community.

WHEREFORE, the plaintiffs demand judgment against the defendant United States of America in the total sum of One Hundred Million, Six Hundred Five Thousand (\$100,605,000.00) Dollars, and each of them individually as set forth more particularly in paragraph XXII of the Complaint, incorporated herein by reference, together with interest thereon, and the costs and disbursements of this action.

Respectfully submitted.

/s/

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/s/

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OFFICE OF THE SECRETARY OF STATE  
FOR TRANSPORTATION

BOARD OF INQUIRY

ACCIDENT INVOLVING THE BOEING 707 PP-VJZ OF  
THE VARIG COMPANY

(SAULX-les-CHARTREAUX-July 11, 1973)

FRENCH VARIG REPORT  
Released 4/6/76

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## DECREE CREATING THE BOARD OF INQUIRY

By decree of July 12, 1973, a Board of Inquiry was established for examining the circumstances, seeking the causes and bringing out the facts in the accident occurring on July 11, 1973 approaching Orly Airport involving a B 707, registered PP-VJZ of the Brazilian Company Varig.

The Board is composed of the following members:

Mr. René LEMAIRE, Engineer, Civil Engineering Department, Chief of General Inspection for Civil Aviation, CHAIRMAN;

General Maurice MARTINET, VICE-CHAIRMAN;

Mr. Philippe TESTU, check pilot, Head of the Flight Control Agency;

Mr. Paul CAROUR, general engineer, civil aviation;

Mr. Paul GUILLEVIC, chief engineer, civil aviation;

Dr. GIGNOUX, Vice-President of the Civil Aeronautics Medical Council;

Mr. André GELY, aircraft commander for Air France.

### 1. SUMMARY

<i>Date of the Accident</i>	<i>Aircraft</i>
Wednesday, July 11, 1973	Boeing 707 PP-VJZ
at 1402 UT*	<i>Owner and Operator</i>
<i>Location of the accident</i>	The Brazilian Company
SAULX-les-CHARTREUX	VARIG
5 km southwest of the thresh-	<i>Persons aboard</i>
old of Orly runway 07	Captain DA SILVA
<i>Type of flight</i>	+ 16 (2 crews)
Regular international transport, RIO DE	117 passengers
JANEIRO—PARIS	

#### *Summary of the accident*

Fire on board during approach to ORLY

Forced landing 5 km before the runway threshold, in the countryside near Longjumeau

Wreckage destroyed by fire

#### *Consequences*

<i>Personnel</i>	<i>Killed</i>	<i>Injured</i>	<i>Material Damage</i>	<i>Lading</i>	<i>Third Parties</i>
Crew	7	10	Destroyed	Destroyed	Damage to
Passengers	116	1	by impact and fire		crops

\*All times mentioned in this report are expressed in universal time (UT). Legal time may be obtained by adding one hour thereto.

## 2. TECHNICAL INVESTIGATIONS

### 2.1 The Flight

On July 11, 1973 the B-707, PP-VJZ flies the regular VARIG line RG 820 between Rio de Janeiro and Paris.

At 3:03 the plane takes off from GALEAO airport with a weight of 326,700 pounds with 117 passengers and 17 crew members aboard.

At 3:50 level 330, cruising level, is reached. The flight proceeds with no particular difficulty at a Mach in the vicinity of 0.8.

At 6:26 the plane ascends to level 370, and at 11:53, to level 390. Cruising is completed at level 350.

At 13:40, when the plane makes contact with the West Terminal sector of the Paris ACC, it is in descent in the direction of the CHARTRES VOR (CHW), estimated time 13:52.

At 13:43, it passes level 230, and at 13:46, level 170.

At 13:50, Paris ACC has the plane turn slightly to the right, short-circuiting CHW, and authorizes continuation of the descent to level 100, reached at 13:52, then level 80, reached at 13:55. At this time, the plane is heading towards the TOUSSUS (TSU) VOR.

At 13:57 the VARIG 820 is transferred to ORLY approach, with which it makes contact one minute later.

It receives instructions to maintain level 80 and to head for OLS, which will bring it into the tail-wind branch of runway 26, in operation at ORLY. The meteorological conditions are excellent and no special procedure is necessary.

At 13:58'20" the aircraft signals a "fire aboard" and requests an "emergency descent".

According to the Captain, this request follows the announcement by the cabin crew of smoke in the rear of the passenger cabin.

At 1359 the plane is authorized to descend to 3,000 feet for landing on runway 07, only 22 MN away and which should allow a direct approach.

In response to a request from Control, the pilot signals "total fire", while the radar brings it onto line 07 and situates it 10 MN from the threshold. According to the crew, this announcement coincides with the cabin steward's alarming indication that the situation is (illegible) invading the cabin and that the passengers are being asphyxiated. The transponder code appears for about one more minute on the Orly radar screen.

The crew puts on the oxygen masks and smoke goggles. However, the black smoke is invading the cockpit to such an extent that the pilots can no longer see the instruments. The side windows are open. Judging the situation desperate, the Captain decides to effect a forced landing.

This is achieved at 14:03, the pilots viewing the ground from the side windows.

Witnesses observe the plane just before its forced landing. They notice a trail of smoke escaping from below the rear fuselage.

The landing site selected, situated in bearing 230 of the threshold of runway 07, 5 km from the latter, is a flat area with small cultivations having a mean altitude of 76 meters, south of the village of SAULXIER (Municipality of SAULX-les-CHARTREUX, Essonne).

The landing gear were extended, the flaps partially extended, the plane at a heading of about 080°, slightly inclined to the left and with a high, nose-up longitudinal attitude.

It touched down just beyond a small road after it had taken the tops off a few small fruit trees. Impact was severe. The left landing gear yielded immediately and was followed shortly thereafter by the right landing gear. The plane then slid on its jet engines, then on its belly for almost 500 m. However, the unequal loss of the main landing gear and the initial inclination to the left triggered a skidding movement which increased until the plane came to a halt.

The wreck came to a halt at heading 280° after losing all of its jet engines and half of the left wing. The forced landing was completely successful. The fuselage suffered little

damage. Only the bottom of the hull behind the main landing gear wells is misshapen.

According to witnesses, the only visible sign of fire after the plane stopped is smoke issuing to the right of the base of the fin.

Ten occupants of the plane escape by their own means: 4 through the right side-window of the cockpit, 4 through the left side-window, 1 through the left front passenger door, 1 through the right front galley door.

Among these ten survivors, all crew members, two (the pilots) were seriously injured, one of them by a tree limb which pierced the front pressure bulkhead while the plane was sliding along the ground, the others suffered from smoke inhalation.

These survivors were very soon met by the farmers witnessing the crash, but all intervention is impossible because of the fire which developed inside the cabin, making access therein impossible.

When the firemen arrive, 6 to 7 minutes after the crash, the fire has caved in the top part of the fuselage in the rear. The plane is filled with smoke. There is no sign of life. The firemen evacuate 4 motionless occupants through the forward door. Only one will survive.

A fire breaks out in the right wing between jet engine struts 3 and 4 shortly before the arrival of the firemen. The left and right wing-root tanks and the center tank do not ignite. On the other hand, fire will break out in the rear hold about one hour after the crash.

## 2.2 Victims Of The Crash

	<i>Crew</i>	<i>Passengers</i>	<i>Third Parties</i>
Fatally injured	7	116	none
Injured	10	1	none
Uninjured	0	0	

## 2.3 Damage To The Aircraft

The aircraft was completely destroyed, with the exception of equipment contained in the electronics hold, which it was possible to salvage.

## 2.4 Damages To Third Parties

Damages to third-parties consist in the destruction of crops in the crash zone, first by the plane, then by the rescuers, and in the destruction of several fruit trees.

## 2.5 Information On The Crew

Due to the length of the flight, there were 17 crew members, twice the normal number.

### *Cockpit personnel*

AIRCRAFT COMMANDER (on duty)

Name: GILBERTO ARAUJO DA SILVA

Date and place of birth: November 12, 1923, SANTA LUZIA

Marital status: married

Airline transport pilot's certificate no. 238

License and ratings valid until February 28, 1974

Medical examination valid until September, 1973  
(unrestricted)

Joined the Company on February 1, 1952

Qualified for the B-707 on February 19, 1968

Date of last in-flight control: August 17, 1972

Date of last simulated control: February 26, 1973

Total flying time logged: 17,959.30

In the 30 days prior to the accident: 29.14

In the 48 hours prior to the accident: 14.03

On the type of plane involved in the accident: 4,642.44

Prior accidents: none

Rest before final flight: 35 hrs.

FIRST PILOT (on duty)

Name: ANTONIO FUZIMOTO

Date and place of birth: July 10, 1928 at BAURU

Marital status: married

Airline transport pilot's certificate no. 787

License and ratings valid until August 31, 1973

Medical examination valid until November, 1973  
(unrestricted)

Joined the Company on February 1, 1952

Qualified for the B-707 on December 5, 1969

Date of last in-flight control: February 21, 1973



Date of last simulated control: August 7, 1972  
Total flying time logged: 17,788.27 hrs.  
In the 30 days prior to the accident: 73 hrs. 47 min.  
In the 48 hours prior to the accident: 11.03  
On the type of plane involved in the accident: 3,331.33  
Prior accidents: none  
Rest before final flight: 61 hours.

**SECOND PILOT (on duty)**

Name: ALVIO BASSO

Date and place of birth: December 1, 1926 at BENTO  
GONCALVES

Marital status: married

Commercial pilot's certificate no. 1097

Group A single-engine rating valid without limitation

Medical examination valid until November 30, 1973  
(unrestricted)

Joined the Company on May 4, 1954

Qualified for the B-707 on September 14, 1962

Total flying time logged: 12,613.02

In the 30 days prior to the accident: 69.38

In the 48 hours prior to the accident: 11.03

On the type of plane involved in the accident: 5,055.46

Prior accidents: none

Rest before final flight: 230 hours

**SECOND PILOT**

Name: RONALD UTERMÖHL

Date and place of birth: May 2, 1950 at PONTA GROSSA

Marital status: single

Commercial pilot's certificate no. 3886

Group A single-engine rating valid without limitation

Medical examination valid until September 30, 1973  
(unrestricted)

Joined the Company on February 16, 1970

Qualified for the B-707 on December 6, 1972

Total flying time logged: 1,540.19

In the 30 days prior to the accident: 47.26

In the 48 hours prior to the accident: 18.14

On the type of plane involved in the accident: 768.41

Prior accidents: none

Rest before final flight: 24 hours.

**MECHANIC****Name:** CARLOS DIFFENTHALER NETO**Date and place of birth:** September 20, 1934, PORTO ALEGRE**Marital status:** married**Mechanic's certificate no.** 731**License and rating valid until** April 30, 1974**Medical examination valid until** March 31, 1974  
(unrestricted)**Joined the Company on** March 1, 1954**Qualified for B-707 on** June 20, 1960**Date of last in-flight control:** April 20, 1973**Date of last simulated control:** April 4, 1973**Total flying time logged:** 16,672.39**In the 30 days prior to the accident:** 90.53**In the 48 hours prior to the accident:** 15.43**On the type of plane involved in the accident:** 11,922.59**Prior accidents:** none**Rest before final flight:** 33 hours**MECHANIC (on duty)****Name:** CLAUNOR BELLO**Date and place of birth:** February 7, 1935, SAO PAULO**Marital status:** Married**Mechanic's certificate no.** 814**License and rating valid until** October 31, 1973**Medical examination valid until** December 31, 1973  
(unrestricted)**Joined the Company on** May 8, 1960**Qualified for B-707 on** September 26, 1966**Date of last in-flight control:** October 11, 1972**Total flying time logged:** 9,655.16**In the 30 days prior to the accident:** 64.32**In the 48 hours prior to the accident:** 11.03**On the tye [sic] of plane involved in the accident:** 4,827.39**Prior accidents:** none**Rest before final flight:** 63 hours**NAVIGATOR (on duty)****Name:** ZILMAR GOMES DA CINHA**Date and place of birth:** July 1, 1930, ARARUAMA**Marital status:** married

Navigator's certificate: No. 114

License and ratings valid until January 31, 1974 (B-707 and DC-8)

Medical examination valid until June, 1974 (unrestricted)

Joined the Company on September 1, 1955

Qualified for B-707 on November 30, 1968

Date of last in-flight control: January 7, 1973

Total flying time logged: 14,140.09

In the 30 days prior to the accident: 74.42

In the 48 hours prior to the accident: 11.03

On the type of plane involved in the accident: 3,286.45

Prior accidents: none

Rest before final flight: 193 hours.

#### NAVIGATOR

Name: SALVADOR RAMOS HELENO

Date and place of birth: June 30, 1928, RIO DE JANEIRO

Marital status: married

Navigator's certificate no. 89

License and rating valid until July 31, 1973

Medical examination valid until January 22, 1974  
(unrestricted)

Joined the Company on August 30, 1951

Qualified for B-707 on September 12, 1965

Date of last in-flight control: February 4, 1973

Total flying time logged: 15,157.02

In the 30 days prior to the accident: 75.22

In the 48 hours prior to the accident: 11.03

On the type of plane involved in the accident: 5,937.22

Prior accidents: none

Rest before final flight: 183 hours.

#### *Cabin Crew*

##### CHIEF STEWARD

Name: JOAO EGIDIO GALLETI

Date and place of birth: July 21, 1939, LINS

Marital status: married

Certificate no. 1003

Ratings valid until December 16, 1973 (B-707 and DC-8)

Medical examination valid until November, 1973  
(unrestricted)

Joined the Company on September 1, 1962

Total flying time logged: 9,064

On the type of plane involved in the accident: 4,841

Rest before final flight: 96 hours

#### STEWARD

Name: EDEMAR GONCALVES MASCARENAS

Date and place of birth: October 20, 1941, CURITIBA

Marital status: married

Certificate no. 684

Ratings valid until January 29, 1975 (B-707 and DC-8)

Medical examination valid until January 14, 1974  
(unrestricted)

Joined the Company on October 6, 1965

Total flying time logged: 6,666

On the type of plane involved in the accident: 3,582

Rest before final flight: 96 hours.

#### STEWARD

Name: CARMELINO PIRES DE OLIVEIRA, Jr.

Date and Place of birth: May 20, 1942, SAO PAULO

Marital status: married

Certificate no. 1546

Ratings valid until October 12, 1973 (B-707 and DC-8)

Medical examination valid until September 23, 1973  
(unrestricted)

Joined the Company on June 12, 1967

Total flying time logged: 5,080

On the type of plane involved in the accident: 3,246

Rest before final flight: 48 hours.

#### STEWARD

Name: SERGIO CARVALHO BALBINO

Date and place of birth: April 18, 1945, ALEGRE

Marital status: single

Certificate no. 1704

Ratings valid until March 19, 1975 (B-707)

Medical examination valid until December 14, 1973  
(unrestricted)

Joined the Company on January 11, 1968

Total flying time logged: 3,983

On the type of plane involved in the accident: 2,407

Rest before final flight: 72 hours

**STEWARD**

Name: LUIZ EDMUNDO COELHO BRANDAO

Date and place of birth: May 17, 1939, RIO DE JANEIRO

Marital status: single

Certificate No. 1855

Ratings valid until June 16, 1974 (B-707 and DC-8)

Medical examination valid until January, 1975  
(unrestricted)

Joined the Company on September 20, 1968

Total flying time logged: 3,295

On the type of plane involved in the accident: 779

Rest before final flight: 96 hours

**STEWARD**

Name: ALAIN HENRI TERSIS

Date and place of birth: August 13, 1946, PARIS (France)

Marital status: single

Certificate no. 2653

Ratings valid until April 30, 1974 (B-707)

Medical examination valid until September 23, 1973  
(unrestricted)

Joined the Company on February 4, 1972

Total flying time logged: 937

On the type of plane involved in the accident: 886

Rest before final flight: 48 hours.

**STEWARDESS**

Name: ANDREE PHIA

Date and place of birth: January 22, 1949, CAIRO (Egypt)

Marital status: single

Certificate no. 2053

Ratings valid until May 31, 1975

Medical examination valid until November 11, 1973  
(unrestricted)

Joined the Company on October 1, 1969

Total flying time logged: 3,015

On the type of plane involved in the accident: 2,685

Rest before final flight: 120 hours.

**STEWARDESS**

Name: ELVIRA STRAUSS

Date and place of birth: April 28, 1949, FRANKFURT  
(Germany)

Marital status: single

Certificate no. 2601

Ratings valid until December 22, 1973

Medical examination valid until October 13, 1973  
(unrestricted)

Joined the Company on September 15, 1971

Total flying time logged: 1,250

On the type of plane involved in the accident: 1,181

Rest before final flight: 48 hours.

**CHIEF STEWARDESS**

Name: HANELORE DANZBERG

Date and place of birth: September 9, 1938, PORTO  
ALEGRE

Marital status: single

Certificate no. 265

Ratings valid until November 11, 1973

Medical examination valid until October 5, 1973  
(unrestricted)

Joined the Company on March 4, 1961

Total flying time logged: 7,989

On the type of plane involved in the accident: 4,345

Rest before final flight: 48 hours

**2.6 Information On The Aircraft**

The PP-VJZ was a Boeing 707 345 C (manufacturing no. 19.841) which was built for the SEABOARD Company, but purchased by VARIG Company, which had leased it to SEABOARD for some time.

Its Certificate of Airworthiness was no. 5712, 1968, which had been renewed the last time on February 12, 1973 and was valid until August 12, 1973.

Its total utilization time was 21,470 hours (5,677 landings). Utilization time since the annual inspection on May 15, 1973 was 539 hours. The last brief inspection occurred on June 24, 1973.

The history of the type JT3 D3 B jet engines is as follows:

Position	1	2	3	4
No.	632.945	645.946	667.821	668.246
Total hours	24,571	16,479	15,966	20,094
Hours since RG	2,225	1,025	3,698	4,594

The status of the plane regarding mandatory inspections and modifications is correct. Reports from flights prior to the accident reveal no irregularities which could have had a bearing on the accident.

Upon departure from RIO, the weight at takeoff was within the prescribed limits: 326,700 pounds, 153,000 pounds of which was fuel, as was the load distribution: 21.3%. The arrangement of the cabin corresponded to version F: one 1st-class cabin with 20 seats in 5 rows, a tourist cabin with 112 seats, 3 of which were —(illegible)—

Forward of the first class cabin there was a galley, a rest station for the crew and three rest rooms. To the rear of the tourist cabin there was a galley, three rest rooms and a closet.

### *Interior design*

Originally, the interior design of this plane was in conformity to specification Boeing D.619.676.

In 1971, the cabin decoration was replaced by a more attractive decoration, conforming to specification Boeing D6.25.601, called WIDE BODY LOOK.

The renovation basically concerned the seat covers, the panelling of the walls and ceiling of the passenger cabin, but the interior design of the rest rooms remained unchanged.

The renovation was performed by the VARIG Company. The material needed for the transformation was supplied by Boeing, with the exception of the carpeting and the fabric for the seat covers, which VARIG procured directly. These materials underwent quality control and in particular a test for flame resistance, before they were used.

Specification D6 25.601 was fully respected, with the exception of the PNC seat covers, where vinyl was replaced by

leather. This material nonetheless satisfies the requirements of the regulation.

#### *Location of the portable oxygen tanks*

During the life of the plane, the portable oxygen tanks for the rear area were placed in three different locations. Originally, they were stored near the cabin ceiling in the baggage racks. Incidents occurring during flight led the Company to seek a place that was cooler and less exposed to unexpected handling. They were then placed behind the last row of seats, near the floor, along the rear galley. It soon became evident that this place is used by passengers to store their carry-on baggage. For this reason, the Company had a closed rack built inside the closet to store the four oxygen tanks. The regulation requires only that it be easy to gain access to the tanks.

### **2.7 Meteorological Conditions**

The meteorological conditions during the descent and the approach were excellent. Orly observations were as follows: 1300 hours—Wind 340/8 Kt

Clouds: 3/8 cirrus at 9000 m

Visibility: 15 km

Temperature: +24.9°

Dew point: +10.8° Humidity: 41%

QFE: 1008 QNH: 1018

1400 hours—Wind: 280/6 Kt

Clouds: 3/8 cirrus at 9000 m

3/8 alto cumulus at 3500 m

Visibility: 15 km

Temperature: +25.8°

Dew point: 11.4°

QFE: 1007 QNH: 1017

1400 UT corresponds to 1500 hours local time. There was almost peak brightness from the sun.

### **2.8 Aids To Navigation**

The radio aids were functioning normally and had no influence on the occurrence of the accident.



## 2.9 Telecommunications

The telecommunications equipment was functioning properly.

The loss of contact during final approach can be attributed, on the one hand, to the fact that the crew did not position its selection box on "mask" and on the other hand, listening over the loud-speaker became impossible when the side windows were opened.

The recording of control radar images was utilizable.

## 2.10 Airports And Ground Facilities

The facilities played no part in the origin of the accident.

## 2.11 Flight Recorders

The PP-VJZ was equipped with a UDC flight data recorder type 542 (time — bearing — speed — altitude — vertical acceleration), but had no cockpit voice recorder.

The recorder was placed in the tail cone, behind the pressure bulkhead. The temperature of the cylindrical protective case was enough to burn off the paint from its front surface; however, the recorder itself was intact and the metal tape could be read normally.

The recorder functioned properly, but stopped during the descent at level 80. The examination of the apparatus excludes the possibility that this was caused by direct heating or linked to a mechanical failure.

The rear pressure bulkhead melted, but the slight damage it suffered in the rear point indicates that this bulkhead gave way after the crash.

The indications given by the crew and by the Air Traffic Control in their messages made it possible to establish a quite accurate correlation between the audio recordings and the FDR. This made it possible to establish the time the recorder stopped at  $13:58'30'' \pm 30$  seconds.

## 2.12 Wreckage

### 2.12.1 Tracks on the ground

The main landing gear of the plane make contact with ground that is hard and dry. The depth of the tracks shows that the plane set down cleanly.

A tilt to the left of about  $4^\circ$  was revealed by the fact that the left reactors touched the ground almost immediately after the main landing gear.

The elevation of the plane is indicated not only by the tracks and the slight damage suffered by the front of the fuselage, but especially by the fact that reactor no. 1 touched the ground before reactor no. 2.

The main landing gear give way almost immediately and the plane, resting on its inside reactors for 48 meters after the initial contact, slides thusly in a straight line for 265 meters before crossing a dirt road.

After this the track in the ground inclines to the left.

The plane is skidding to the right when it runs into an apple tree with its radome and left wing. A large branch from this apple tree enters the cockpit behind the instrument panel on the left-hand side, while the left wing is cut in half.

This shock accelerates the skidding and the plane comes to a halt 240 meters later, after travelling a total distance on the ground of almost 600 meters at a heading which is almost the opposite of the initial heading.

#### *2.12.2 Examination of the fuselage*

The damage to the fuselage during the crash is slight. It did not break. The ventral keel is intact. Structural deformations are minor, except near the rear hold. The lower skin is torn only at the level of the left rear corner of the rear hold. It is probable that the sliding over the ground flattened the hull bottom under this rear hold, thus creating a sharp angle which the final skidding opened. This tear, parallel to one of the stringers, extends over approximately one meter.

Under the floor, the fuselage suffered little damage from the fire. The electronic hold is almost intact. The front landing gear leg was torn off at the end of the skidding and remained perpendicular to the gear well. The front cargo compartment is simply blackened by soot. Its door is functioning. The oxygen tanks for this compartment are intact and show no sign of heating. The air conditioning hold is in good condition. The mid-wing frame is intact. The main landing gear wells suffered only from the tearing away of the gear. The cooling units were partially torn off just before the plane stopped.

The rear cargo compartment suffered from both the crash and the fire. The floor above this compartment was 75% melted. The oxygen tanks from this compartment did not explode. They are empty and burnt. The luggage was partially burnt. The unused compartment behind the cargo compartment, i.e., under the galley and the rest rooms, was damaged by fire in those places where there is no more upper floor. The tail cone shows traces of fire only near the pressure bulkhead.

Damage by fire to the fuselage above the floor level increases when moving away from the forward part of the plane. The top of the fuselage melted from the front of the first class cabin as far as the rear pressure bulkhead.

On the sides, the damage stops above the port-holes in front of the wing, but continues downwards almost to the floor level behind the wing.

In front of the wing and on the wing, the floor is intact. In front of the first class cabin, the carpet is only partially burned. On the other hand, the floor has disappeared under the closet, the access corridor for the rear main door, facing the galley, and behind the tourist class cabin. The flooring under the galley and the fuselage wall which it rests against, did not give way.

The rear pressure bulkhead melted.

The four portable oxygen tanks were found burned and empty on their rack. They had lost their valves and finishings.

This area is one of the points of maximum fire intensity.

Between the rear pressure bulkhead and the trailing edge of the wing, only the metal parts of this part of the cabin remained, with the exception, however, of what was in the galley. The containers protected the combustible products which they contained and thus made it possible to identify them.

While the effect of the fire in the rear is almost identical on the floor and on the ceiling, from the first-class cabin the influence of the fire increases when moving away from the floor. This can be better seen in the cockpit, where the influence of the heat is almost non-existent below the navigator and mechanic's panel.

### 2.12.3 *Examination of the wings and rudders.*

The left wing is sheared between struts 1 and 2. However, the control cables did not give way and the extremity of the wing stayed with the main wreckage. Tanks 2 and 5 contain fuel.

The right wing burned on the level of tank 4. Tank 3 did not suffer from the fire, but was emptied as a result of damage to the wing.

Jet engine struts 1 and 2 were torn off, while struts 3 and 4 remained in place.

The leading edge flaps are extended. The trailing edge flaps are partially extended: 13 threads on the feed screw, i.e., 6° of flap.

Ailerons and spoilers were damaged only by the crash.

The tail units are in place and only slightly damaged. The control nut for the fin is at 17 threads, high position, corresponding to a setting between 0 and 1° plane nose-down.

The control cables for the horizontal and rudder stabilizer passing under the floor which burned, are in place.

### 2.12.4 *Examination of the cockpit*

Other than panel P 8 (instrument panel of left-hand pilot seat) whose instruments were torn away from and pushed back onto their support, the cockpit was undamaged by the crash.

The heat in the upper part did no more than impair the breaker panels, deform the switches and obscure the instruments.

Indications concerning the general configuration of the plane are as follows:

Plane:

Landing gear control: lowered

Flap control: 14°

Flap indicator: Outer L 30° R 0°

Inner L 43° R 27°

Air brake control: 50° (handle unjammed)

Fire-break: not pulled

Wing and nacelle de-icers: off

Stabilizer: 0°

Aileron trim: 1° to the right

Rudder trim: at neutral  
 Automatic pilot: off  
 Transponder: operating  
 Doppler indicator: 166 KT on both  
                                     Fin (right indicator inoperable)  
                                     max. left.

Signs and exit lights: on  
 Flight recorder control: broken  
 Passenger oxygen: off  
 Crew oxygen: on

**Air conditioning:**

Turbocharger controls 2, 3, 4: normal  
 Tapping control: 1 and 3 on  
                                     2 and 4 off  
 Wing insulation valve control: left off  
   right on  
 Dynamic air intake control: off  
 Control for air conditioning units: both off  
 Control for thrust recovery valves: off  
 Control for mixture valves: both on manual

**Electrical supply:**

D.C.—battery on  
                                     measurement selector on primary T.R.  
 A.C.—all alternators dog-clutched  
                                     primary bus-bar on alternator 3  
                                     parallel control selector on alternator 3  
 Exciter relay switch: normal  
 Line relay switch: normal  
 Interlocking relay switch: normal  
 Wattmeter: minimum  
 Galley power supply: off

**2.13 Medical and Pathological Information**

122 bodies were found on the ground following the forced landing of the B-707 PP-VJZ on July 11, 1973 at 1500 hours in the community of SAULX-les-CHARTREUX (Essonnes), or:

116 out of the 117 passengers who boarded the plane  
 6 crew members out of the 17 who boarded the plane,

while the only surviving passenger and the 11 surviving crew members had to be transported to the Henri Mondor Hospital in Créteil.

Among the latter, Mr. HELENO SALVADORE, navigator, had attempted to take cover in the forward rest rooms. He was burned externally on the face and neck, and internally over the mucous membranes of the digestive and respiratory tracts in the throat. He was taken in a coma to level III of the Henri Mondor Hospital, where he was to die on July 22, 1973, from kidney failure 11 days after the accident. The coefficient of carbon monoxide poisoning was not investigated, but the proportion of carbon monoxide in the blood amounted to 40 milliliters per liter, approximately corresponding to a coefficient of carbon monoxide poisoning of .16. In this case, then, carbon monoxide poison was not the cause of death.

Among the 122 victims found on the ground, the blood was examined on all but two of the bodies.

From the 120 other bodies:

- 16 showed a CO poisoning coefficient under .50
- 11 had a coefficient ranging between .50 and .60
- 93 had a coefficient equal or over .66.

It is usually thought that a coefficient of .66 is fatal.

Thus, out of the 120 bodies collected on the ground whose blood was examined 78% showed a carbon monoxide poisoning coefficient equal or over 66%, and death must be considered as the result of carbon monoxide poisoning.

However, 9% had a coefficient ranging between .50 and .60. For them, the probable, but not definite cause of death may be considered as being carbon monoxide poisoning.

For the 13% whose coefficient of poisoning was lower than .50, carbon monoxide poisoning cannot be excluded as the cause of death. In fact, KOHN ABREST had pointed out fatalities where the coefficient did not exceed 20%.

The analysis of escaping combustion gases from samples taken in the cabin revealed, in addition to a substantial amount of carbon dioxide, the presence of carbonic acid gas, chlorhydric acid and fluorhydric acid.

The presence of the latter two acids, in contact with the nasal and laryngeal mucous membranes, causes a reflex

characterized by respiratory failure and decrease in cardiac rhythm.

This breathing failure, a veritable reflex inhibition, is the result of a peripheral stimulation of the area innervated by the trigeminal nerve and the upper laryngeal nerve.

Therefore, death would have been caused by inhibition.

It would have been helpful to know the seats occupied by the passengers in the plane and to compare this information with the results of the blood analyses. Given the circumstances surrounding the accidents and the priority which had to be accorded to saving the lives of the survivors, it was impossible to observe the recommendations specified in Chapter 9, appendix 9 of the ICAO's manual on airplane accidents. It is not possible to determine the exact seat occupied by the victims at the time of the crash.

The results of analyses performed on the bodies of the six crew members—other than HELENO SALVADOR—who died in the accident are as follows:

1) UTERMOEL, second pilot

The coefficient of carbon monoxide poisoning was .78 and the proportion of carbon monoxide in the blood amounted to 140 milliliters. The investigation reveals, however, that he was in the rear, in the passenger cabin, next to stewardess ELVIRA STRAUSS.

2) DIEFENTHALER, mechanic

The poisoning coefficient was low: .37, and the proportion of carbon monoxide was 90 milliliters.

It is also known that he was standing in the cockpit and that he suffered a brutal shock when the plane landed, the top of his skull being torn away and causing his death.

3) MASCARENAS, Edomar, Steward

Coefficient of carbon monoxide poisoning: .48

Proportion of carbon monoxide in the blood: 100 milliliters

The inquiry did not reveal his location at the time of the crash.

4) BALBINO CARVALHO, Steward

Coefficient of carbon monoxide poisoning: .66



Proportion of carbon monoxide in the blood: 130 milliliters

The body was found in the first-class galley and removed by the firemen through the forward starboard door.

5) ELVIRA STRAUSS, Stewardess

Coefficient of carbon monoxide poisoning: .78

Proportion of carbon monoxide in the blood: 140 milliliters

The inquiry established that she was in the rear of the plane, in the tourist class cabin.

6) HANELORE DANTZBERG, chief stewardess

Coefficient of carbon monoxide poisoning: .66

Proportion of carbon monoxide in the blood: 130 milliliters.

The sole surviving passenger who, seating in the tourist section, had followed chief steward GALETTI to the cockpit, was found in the first-class galley when the plane was evacuated; his name is RICARDO TRAJANO. He suffered from burns of the respiratory tract and from tegumentary burns, especially in the lumbar region. He was taken to Professor GUENAUD's offices at the Mondor Hospital, and returned to Brazil after seven weeks of hospitalization.

The following crew members had only slight injuries causing no permanent physical damage: ALVIO BASSO, CLAUNOR BELLO, ZILMAR DA CUNHA, GALETTI JOAO, COELHO, TERSIS, PIA ANDREA.

## 2.14 The Fire

Since this was a cabin fire, it seemed useful in this section to examine the statements of the survivors and to establish insofar as possible, a chronology of the facts based on these statements.

The discovery of the fire is well documented, since two of the stewards who were there survived the crash.

MASCARENAS (deceased) was in the rest room corridor, TERSIS (survivor) was straightening up the galley, CARMELINO (survivor) was seated on the fold-down seat near the rear passenger door.



A woman passenger exiting from the port-side rest room was heard to say, "I almost died in there". MASCARENAS and TERSIS went over to the rest room. CARMELINO got up and looked.

TERSIS saw white smoke descending from the ceiling of the rest room in the corner near the mid partition.

The two witnesses saw no flames.

TERSIS and MASCARENAS went back toward the cabin.

TERSIS cut off the power for the rear galley, while MASCARENAS grabbed the fire extinguisher which CARMELINO was carrying back with him. CARMELINO then went toward the cockpit to alert the cockpit personnel.

CLAUNOR (survivor) was seated at the mechanic's position. He confirms that CARMELINO came in to say that there was smoke in the rear rest rooms and that they should go look.

CARMELINO returns toward the rear with DIEFENTHALER (deceased), the second mechanic. It is probable that after MASCARENAS emptied his extinguisher he entered the cockpit, since GALETTI (survivor) points out that he was informed of the incident by MASCARENAS who was holding an empty extinguisher in his hand.

GALETTI and MASCARENAS joined DIEFENTHALER and CARMELINO in the rear. At that time, the smoke did not allow access to the rest rooms.

It appears that DIEFENTHALER was the first to return to the cockpit to get a mask and a tank of oxygen.

During this time, the smoke continued to advance: it entered the tourist cabin. The stewards and chief steward tried to reassure and calm the passengers.

GALETTI returned to the cockpit and warned of the seriousness of what was happening. All survivors from the cockpit except CLAUNOR state that they learned of the incident from GALETTI. It appears likely that the first announcement made over the frequency corresponds to GALETTI's intervention. According to the sequence of events given by almost all witnesses, it was at this time that the rest room circuits were broken. CLAUNOR says

that one of the circuit-breakers was already pulled out. He re-engaged it only to have it pop out immediately after.

Stewardess ANDREA (survivor) who was re-applying her makeup in one of the forward rest rooms, exited after the lights went out. She then saw CARMELINO wearing an oxygen mask. We know from CARMELINO that DIEFENTHALER helped him put on his safety harness so that he could go and open the tourist cabin wing emergency exits. (In order for DIEFENTHALER to have suggested this, it is certain that the plane was depressurized).

At the same time, ANDREA saw that the smoke was starting to penetrate the first-class cabin.

Statements from witnesses reveal that the smoke, which progressively invaded the rear of the plane from the rest rooms to the last rows of seats was white.

The smoke front appears to have advanced regularly, turning black. The statements from witnesses tend to reveal that the black smoke appeared on the cabin ceiling almost simultaneously in the tourist and first-class cabins and that it advanced not only horizontally but also in the direction of the floor.

GALETTI returned to the cockpit; he described the rapid and catastrophic development of the situation. This announcement by GALETTI presumably preceded the message from the crew of "total fire on board".

It was approximately at this time that CARMELINO returned to the tourist cabin. Despite his mask he advanced with difficulty, since visibility was zero. He saw three flashes occurring in the back of the plane. The blast threw him onto the floor. He returned toward the front.

General agreement among the survivors reveals that it was on the second entry of GALETTI that the smoke could be seen in the cockpit. An emergency descent was made while, according to CLAUNOR and FUZIMOTO (survivor) the plane was depressurized. The crew put on masks and goggles.

It was apparently at that time that DIEFENTHALER cut off alternators 1, 2 and 4.

The smoke rapidly became thicker in the cockpit. The pilots state that they opened the side windows when it became difficult to see the instrument panel and that they made the decision to "crash land" the plane shortly thereafter.

It would not appear, according to witnesses, that opening the side windows improved visibility in the cockpit. The pilots landed the plane using VFR, with their heads out the window.

At the time of the crash, there were nine people in the cockpit:

- FUZIMOTO, in the left pilot-seat
- GILBERTO, in the right pilot-seat
- ALVIO, in the observation seat
- ZILMAR, in the navigator seat
- CLAUNOR, in the mechanic's seat
- DIEFENTHALER, standing behind CLAUNOR
- ANDREA and GALETTI, in the middle of the cockpit
- CARMELINO, against the cockpit door.

When the plane came to a halt, the fire was contained in the fuselage. According to one of the witnesses on the ground, a few minutes after the plane stopped, there were flames under the fuselage, fully behind the port side, enveloping the skin on the outside. There were no flames visible on the top.

The roof was pierced first to the right of the base of the fin. The explosion of tank 3 seems to have occurred at this time.

A ground witness who is an Air France B-707 steward arrived on the scene and described the incident as follows: The inside of the plane slightly behind the wings was on fire. This was not a violent fire but rather a silent combustion. The smoke was extremely thick. The rear part of the roof was already destroyed. The fire advanced slowly forward without, however, increasing in force.

The first fire engines arrived on the scene at 14:11 UT, 6 to 7 minutes following the crash. The fire was completely extinguished at 14:50. It broke out again in the luggage compartment, but was quickly brought under control.

### 2.15 Survival

The forced landing was fully successful. It was possible to survive the accident from the standpoint of accelerations undergone when the plane travelled along the ground. Only second mechanic DIEFENTHALER was fatally injured

when the plane crashed, since he was standing, unsupported and unharnessed.

It is, however, noteworthy that except for the occupants of the cockpit and two members of the cabin personnel who found themselves under special conditions (TERGIS and COELHO), no one was able to escape from the plane on his own, even though all exits remained completely utilizable.

Of the nine persons who were in the cockpit, five had oxygen masks. Although tests proved that the opening of the side windows caused smoke inhalation, it also caused turbulence which was beneficial to those who had no mask.

TERGIS, seated near the forward passenger door, protected his face with a damp cloth. COELHO, seated near the forward galley door, used the portable breathing apparatus left behind by CARMELINO and which he had found when freeing the access to the galley door.

In the cabin, no exit had been opened. Voluntarily, in the absence of any instructions, the oxygen masks had not been released.

The condition of the occupants of the cabin when the plane came to a halt can be evaluated with the aid of several statements by witnesses. Among those persons carried off by the firemen, i.e., those who suffered from the effects of the smoke eight to ten minutes more than the first, it was possible to revive two out of three. Only one of them, however, survived.

In the forward area, where damage caused by smoke was slightest, there are no apparent signs of attempts to escape.

Those crew members (HELENO, BALBINO) who were near the doors used by TERGIS and COELHO and who were quite familiar with the layout of the plane, were unable to exit.

It is therefore quite probable that the occupants of the cabin were quickly powerless to react and that they were unconscious at the time of the crash. It is likely that most victims died only after the plane had come to a halt.

## **2.16. Expert Evaluations**

### **2.16.1 Examination of the air outlet openings of the fuselage**

The ventilating air escapes through five openings:

—two permanent outlets, one forward and the other aft, which drain off fumes from the galleys and rest room odors. They are equipped with a venturi for limiting the flow rate when the differential pressure is high.

—two outlets coming from the discharge control valves which regulate pressure

—one cooling air discharge opening from the radio installations.

The Board has made the following observations:

a) A substantial track caused by smoke and which rapidly corroded, can be seen at the exit of the rear permanent outlet. An analysis of the corrosion in this trail showed that the metal had been attacked by chlorhydric acid.

The inlet and the venturi were immediately taken for an analysis of combustion deposits. These units were useful in that they had not been handled by the life savers or contaminated by the extinguisher products.

b) There is a slight trail of soot behind the forward permanent outlet with a mean axis which is not parallel to the fuselage but which corresponds to a fuselage angle of about  $5^{\circ}$ .

c) There are considerable traces of smoke around the rear discharge valve outlet.

d) There were no traces of smoke around the forward discharge valve outlet.

e) The same holds true for the most part for the cooling air outlet from the —(illegible)—

#### **2.16.2 Examination of the rear rest rooms**

There are three rest rooms in the rear of the plane. Rest room C on the starboard side and rest room D on the port side are symmetrical and back to back with the rear pressure dome. Rest room E is located on the starboard side between rest room C and the galley.

Rest rooms C and D are part of the standard arrangement in a cargo version. They can only be dismantled part by part: sink, toilet, wall panels. On the other hand, rest

room E is designed for easy removal in cargo utilization. It consists of one unit which can be easily moved and hooked up.

The three rest rooms were found in identical condition. Doors, partitions, panels have disappeared. Only the metal elements remained; tank, toilet motor and bowl, sink, filter, electrical wires. The floor of the plane under rest room E, as well as the under skin of the fuselage next to this rest room were less damaged here than elsewhere.

All that remains of the pressure dome is a rim about 30 cm wide. The sealant where the dome and fuselage join is blistered and burnt over its entire length except under the floor. The two brackets and the upper reinforcing cross-beam in the plane of the dome and fuselage joint were melted.

The fuselage skin disappeared symmetrically in the upper part.

On the sides, the effect of the fire is much less symmetrical.

On the starboard side, the skin was heated evenly over the entire width of rest room C from a height of approximately 50 cm above the floor. The metal became soft and broke under the weight of the tail unit between the two ring-frames before the dome, i.e., near the toilet bowl of rest room C (station 1415).

On the port side, the effect of the fire on the skin of the plane begins clearly lower and more toward the front—almost at the limit of the closet and rest room D, slightly below the level of the floor. On this side, the weight of the tail unit not only caused, in the upper part, a vertical rip which continued until just beyond the passenger door (station 1390) but also singed the lower part of the skin.

On the port side the floor is perforated. Here are found, among considerable melted alloys, the oxygen tanks, unexploded, but finishings destroyed.

The shape of the tears shows that the fire reached its maximum intensity only after the plane had come to a halt.

### **2.16.3 Examination of the rear galley**

This galley consists of three portable units, as was rest room E. Units 3 and 4 are installed on the starboard side on



either side of the rear service door. Facing them, on the port side, between the passenger door and the tourist-class cabin, is unit 5.

Units 3 and 4 withstood the fire rather well. Damage is external. Anything in a drawer, a container or an oven was only slightly damaged. The wastepaper basket in unit 4 was lost but its position would cause it to escape from its housing during considerable deceleration of the plane. The newspapers which were piled up in unit 4 burned only superficially. The electrical circuits of these two units were destroyed. No evidence of a short circuit was revealed on the conductors, but their condition is such that no formal conclusion can be drawn.

Unit 5 no longer exists. This unit is basically a storage area. It has no cooking equipment. It is not supplied by electricity. In its upper part 60 woolen blankets are usually stored.

The floor on the starboard side under units 3 and 4 fully withstood the fire. On the port side, under unit 5, it disappeared. In front of this area, i.e., in the rear of the tourist cabin, the floor melted over its entire width.

The fuselage walls resisted half way up the sides of the cabin. Nothing remains of the top of the fuselage, the ceiling and the lifesaving equipment (rafts) which are normally stored over the access corridor to the tourist cabin.

#### **2.16.4 Examination of the cabin**

##### **a) Galley, forward rest room, crew compartment**

Damage by the fire involves only the upper third of this space. The top of the fuselage is intact. The false ceiling disappeared but the partitioning withstood. The rest rooms suffered little from the fire.

In the crew compartment, the foam mattresses were only partially burnt. The furniture in the galley was more heated than burnt. The passenger and service doors operate normally. The extinguisher (water) placed near the passenger door is intact, but the CO<sub>2</sub> cartridge, swollen by the heat, is empty.

##### **b) First class cabin**

The collapse of the top of the fuselage begins with the first class cabin. Nothing remains of the arch above the line of port holes beginning with the first rows of seats and con-

tinuing towards the rear. Laterally, the inner skin remains in part. The air conditioning pipes are visible. The seats are in place, and undeformed. Only the backs of the seats burned completely. The carpet shows localized burns. The partition separating first class from tourist has disappeared.

c) Tourist class cabin

Over the wing the seats are completely burnt, but the floor covering withstood. The inner wall coverings are totally gone beyond the last wing exits. Over the landing gear wells, the floor is intact. It sinks and then disappears over the rear hold. Its destruction is not symmetrical. On the port side, it is almost entirely destroyed over the entire length of the hold. On the starboard side, its destruction is practically limited to the space included between the two hold doors. Similarly, the side wall withstood the fire better on the starboard side than on the port side. It should be noted that this port-side zone was used by the firemen to gain access to the plane.

Nothing remains of the rear part of the tourist cabin, the debris from which fell into the baggage hold.

**2.16.5 Examination of the rear baggage hold**

The rear baggage hold extends from the main landing gear wells to the axis of the rear galley door. This hold has two doors on the starboard side. On either side of the second door are found the oxygen reserve of the normal cabin circuit and in the rear, the water reserve for the rest rooms and the rear galley.

The structure of this hold is that part of the plane most damaged from the skidding of the plane over the ground. Neither the keel nor the bottom of the hull gave way, but both were misshapen. The skin was torn along a generating line on the port side of the hold and in the rear.

The condition of one of the edges of the opening shows that the fire had not yet reached this area at the time of the crash.

All passenger luggage had been placed in this hold. Most of this luggage was only partially burnt. Damage caused by the fire is distinctly more substantial in the rear than in the front, and for each of these two sectors, front and rear,



damage is greater when moving away from the floor of the hold. When this hold was cleaned out no major, localized source of heat was noted which would have allowed the possibility of luggage combustion.

The most calcinated area is at the level of the oxygen tanks (three 3,200 liter tanks—pressure 120 bars). These tanks emptied themselves but did not explode. The crash did not tear them from their support, but it is probable that the damage to the oxygen pipes is the result of deformations caused by the impact, although it may be that the damage resulted from the heat of the fire or the intervention of the rescuers.

This would explain the fact that the oxygen ejected through the overpressure valves was not directed outwards, as is normally the case, but spread through the hold. This would explain the intense burning in this area and in particular the melting of the cabin floor above this zone.

The pressure safety valve located in front of this hold was recovered in good condition. The rear flow valve of the pressure system was also recovered in good condition. This valve is located outside the hold in the compartment which is unused because it is too low. This compartment extends the rear hold as far as the rear pressure dome. This space contains only the air conditioning pipes of the rest room zone, the water and drain pipes and the tail unit control cables. It has no direct access to the outside. The only possible access is gained by dismantling the partition in the back of the baggage hold. This partition is not impermeable so that proper pressurization of the hold can be maintained. The only electrical supply in this space involve the de-icing of the water pipes and the operation of the flow regulating and thrust recovery valves.

This compartment was damaged by the fire only to the right of the perforations of the upper floor.

In summary, the observations made in the rear hold and in the compartment next to it appear to eliminate the possibility that the fire started there.

#### ***2.16.6 Examination of the forward holds***

The forward baggage hold is situated between the electronic hold and the air conditioning compartment.

Neither the heat nor the impact damaged these three spaces. A slight coating of soot can be seen in the baggage hold, which contained only the suitcases of the crew and some flight supplies.

The three oxygen tanks of the cockpit circuit are intact but empty. The finishings and the oxygen distributing harness are also intact.

The plane's battery was not destroyed in the crash.

The air-conditioning units situated under the fuselage, behind the forward hold were partially torn away when the plane skidded along the ground.

### 2.16.7 Examination of the electrical circuits

#### a) Main supply

Examination of the mechanic's console reveals that the primary bus-bar was connected to alternator 3.

The surviving mechanic states that his co-worker turned off alternators 1, 2 and 4 shortly before the crash.

The main relays were removed and evaluated. The following positions were found:

Excitation relay (GCR)				
No. Control Panel	ZJ 31 97	OL 3552	XM 4356	UM 4311
GCR	off	on	off	off
Circuit breaker	engaged	engaged	engaged	engaged
Line relay (GB)				
Number	11.662	11.668	11.641	19.617
GB	off	off	off	off
Coupling relay (BTB)				
Number	23.401 ML	19.249 ML	27.983 ML	27.986
BTB	on	on	on	on

All of these units were verified as to their operation. They were all found to be in operating condition with the minimum required performances.

The switching off of the circuit breaker of Control Panel 4 is not significant. This circuit-breaker protects the bypass circuit of the excitation relay and is only involved in the start-up of the plane without voltage.

The positions found on the main relays suggest the following hypothesis. During descent, the crew switched off the line relays. The switching off of excitation relays no. 1, no. 3 and no. 4 is merely the consequence of the action of the auto-

matic protection devices following the damage suffered by the primary power supply upon impact.

b) Distribution circuits

A major portion of these circuits passes through the ceiling of the forward hold, an area which was not touched by the fire. Examination of the conductors showed no damage.

c) Rear rest-room circuits

Seven circuits involve the rear rest-rooms:

1) *Signals*—This circuit illuminates a flashing light in each rest room when the signs "Fasten your seat belts" are operating. The light is located in the backing of the sink. This circuit is protected by circuit-breaker 77 in panel P. 6.

The mechanic pointed out that the electric circuits of the rear rest rooms were broken, one by one, from the circuit-breaker panels, one of the circuit-breakers from the last row of panel P. 6 was already switched off. He re-engaged it but it switched off again.

After the mechanic examined the wreckage, he certified that the circuit breaker in question was one of the following:

75 NO SMOKING	off
76 NO SMOKING	off
77 RETURN TO SEAT	off
78 SEAT BELT	on
79 SEAT BELT	off
80 LAVATORY DOME LIGHT	off

He cannot positively identify the circuit-breaker which had switched itself off, but believes it to be number 77, RETURN TO SEAT.

2) *De-icing of water pipes*—This is a heating coil which surrounds the water pipes and a resistor which de-ices the drain pipe. The latter circuit is protected by circuit-breakers 4 and 33 in P1. The heating coil is supplied by the toilet-flushing circuit by a fuse and a thermo-switch.

The pipes are located in the empty compartment under the rest-rooms and which was only slightly damaged by the fire. It is improbable that a short-circuit in this area started the fire.

3) *Rest room light*—This circuit, signalling that the rest-rooms are occupied, is almost entirely outside the rest rooms themselves. It is protected by circuit-breaker 40 in

P.7. Damage to it was so severe that no valid observation could be made.

4) *Razor power supply*—This circuit supplies the razor outlet situated on the back of the sink. It is protected by circuit-breakers 14 in P.1 and 45 in P.5. The converter (one for the three rest-rooms) is also protected by fuses. Damage was so great that no valid observation could be made.

5) *Rest room lighting*—These circuits are protected by circuit-breakers 19 and 22 in P.4 and 80 in P.6. The degree of damage did not allow any valid conclusions to be drawn.

6) *Flushing of toilets*—This circuit supplies one pump per toilet which flushes the bowl. It also supplies the re-heating of the drain pipes. It is protected by circuit-breaker 25 in P.4. This circuit was also severely damaged by the fire.

7) *Water heater*—This circuit is the most critical, on the one hand because of the power installed and on the other, because of the position of the water-heaters which are placed in the space used as a receptacle for used paper towels. The three water-heaters of the rear rest-rooms are supplied by 115 triphase V. This circuit is protected by circuit-breakers 7, 8 and 9 in P.3. Two phases supply the heating resistors (400 W). The third controls the heating relay by means of a thermostat. In addition to this thermostat which is released at 52°, two overheat thermostats in series with the heating rods, cut off the power when the temperature reaches 71°.

An exhaustive study of the incidents involving the water-heaters had been undertaken with the collaboration of the Air France Company. The results of this study produced no conclusive facts until January, 1974, when two serious incidents occurred.

In the first incident (F-BHSI-January 5, 1974), a passenger noted that there was smoke in the rear lavatory. Visual inspection revealed that the feed wires of the water-heater had burned and melted in the coupler. The feed wires had fallen into the used paper towels.

Upon dismantling, the heating coil was found to be burnt along a generating line.

In the second case (F-BHSP-January 18, 1974) a steward pointed out that there was no more hot water in the rear rest room. Once again, the feed wires were found to be broken. The insulating part of the connector which contains the two coupler plugs was burnt had been ejected from the metal body of the coupler. The feed wires had fallen into the used paper towels.

The two heating rods have the following points in common:

- corroded areas appear on the metal casing of the rods;
- the rods became swollen;
- one of the coupler pins was melted.

However, it was noted that in the first case the neoprene joint between the heating rod and the coupler was swollen outwards while in the second case, the joint was in place, but the insulating assembly of the coupler was ejected.

The analysis of the heating rods in question, conducted at the "Centre d'Essais des Propulseurs", as well as those which had shown low insulating resistance during the inspection campaign, made it possible to determine how the breakdown occurred.

When the casing is perforated by corrosion, water absorbs the magnesium in which the resistor is embedded. Under the influence of successive heatings, the water travels toward the chamber at the base of the rod. The accumulation of water in this chamber then causes a short-circuit between the extremities of the resistor and the base of the casing. This short-circuit heats and burns the coupler. The steam pressure in the chamber can be sufficient to eject the coupler.

The water-heaters of the PP-VJZ were evaluated in the light of these observations. The internal coloring of the water-heaters shows that they withstood a temperature over 600°. With the exception of one of the heating rods of the right front water-heater, all of the current supply sockets disappeared.

Oxidation of the water-heaters and the rods appears to be due solely to the effect of the fire.

The resistor casings are intact and the electrical elements in good condition.

The insulating defect of the rods of the rear water-heater is due to deposits originating from the combustion of the insulators of the wires which connect to the sockets.

Briefly, there is nothing to indicate that the water-heaters were the origin of the fire.

The electric water-supply control circuit is located outside the rest rooms and was not taken into consideration.

#### **2.16.8 Examination of the air-conditioning circuits**

The principal elements of the air-conditioning circuits in the fuselage were removed for evaluation.

Following are the main observations noted upon dismantling:

1. The internal condition of the circuits excludes the possibility of overheating or escape of smoke from this system.

2. The insulating valve of the right wing is closed, that of the left wing is open. This confirms the indications of the mechanic's panel. The only possible sources then are turbocharger no. 2 and taps 1 and 2. The mechanic's panel provides no certainty as to the functioning of turbocharger no. 2, but indicates that tap no. 1 was in service and that tap no. 2 was cut off. It may be noted that the operations carried out by the crew correspond precisely with the emergency procedure for smoke originating from the air-conditioning system.

3. The thrust recovery valves are closed. The automatic radio ventilation valve is open. These positions correspond to normal, automatic operation when the differential pressure becomes low.

#### **2.17 Additional Information**

##### **2.17.1 VARIG instructions in case of fire**

Chapter I of the VARIG Company's emergency procedures (January 1972 edition) covers smoke and fire problems.

- Paragraph 1.1 deals with engine fires.

- Paragraph 1.2 concerns fires and smoke of electrical origin.

In the latter case, the procedure is divided into three phases:

*Phase I*

1. Put on masks and goggles (crew)
2. Open oxygen to 100% (crew)
3. Connect the intercom
4. Turn on white lighting
5. Compensate the plane for manual control
6. Open all line relays and coupling relays.

If the smoke persists:

*Phase II*

7. Close all line relays
8. Transfer power supply of left horizon
9. Place primary bus-bar selector on park

If the smoke persists:

10. Open the battery switch
11. Open circuit-breaker of bus-bar 28 volts D.C.
12. Open circuit-breaker of primary rectifying transformer
13. Open circuit-breaker of ampli-intercom
14. Re-activate bus-bar

—Paragraph 1.2 concerns the emission of smoke through the air-conditioning system.

The initial part of the procedure is aimed at locating the source and halting the escape of smoke. The second part deals with the evacuation of the smoke.

*Phase I*

1. Put on masks and goggles (crew)
2. Open oxygen to 100% (crew)
3. Connect the intercom
4. Close thrust-recovery valves
5. Turn off individual air vent
6. Activate turbocharger no. 2 or taps 1 and 2
7. Close right wing insulating valve

If the smoke persists:

8. Open right wing insulating valve
9. Activate turbochargers 3 and 4 or taps 3 and 4
10. Close left wing insulating valve



If the smoke persists:

11. Close the left air-conditioning unit

If the smoke persists:

12. Open left air-conditioning unit
13. Close right air-conditioning unit

If the smoke persists

Descend to an altitude which is compatible with the safety and performance of the plane. Follow the procedures for non-pressurized flight.

### *Phase II*

#### a) Pressurized flight

Evacuation of smoke during pressurized flight is normally achieved with the usual ventilation. In cases of substantial quantities of smoke, the following procedure supplies maximum ventilation.

1. Put on masks and goggles (crew)
2. Open oxygen to 100% (crew)
3. Connect intercom
4. Increase cabin altitude (10,000 feet)
5. Activate maximum turbochargers and taps

Do not exceed an overpressure gain of 20 inches of water  
Do not depressurize.

#### b) Non-pressurized flight

Smoke evacuation is better during pressurized flight.

Use the following procedure only during non-pressurized flight:

1. Put on masks and goggles (crew)
2. Open oxygen to 100% (crew)
3. Connect intercom
4. Find holding speed
5. Open co-pilot window.

Paragraph 1.4 deals with landing-gear fires

Paragraph 1.5 concerns cargo hold fires.

2.17.2 Numerous analyses, evaluations and verifications were performed. Among the most important requested by the Board of Inquiry are the following:

- the evaluation performed by Colonel DUSCH of the Paris Fire Department concerning the origins and spreading of the fire in the PP-VJZ;
- the studies of escaping smoke undertaken by the Toulouse Aeronautical Test Center;
- the research carried out by various airline companies, in particular AIR INTER and UNITED AIRLINES, and by the BOEING Company concerning the problems of smoke evacuation.

### 3. ANALYSIS OF THE FACTS

#### 3.1 Locating The Origin Of The Fire

3.1.1 The examination of the wreckage reveals that the zone where the fire initially broke out and developed is the portion of pressurized cabin located over the cabin floor and behind the tourist-class galley, i.e., in the space occupied by the 3 rear rest rooms, the closet and the central corridor giving access to them.

This examination, confirmed by other observations made, makes it possible to eliminate the hypothesis of a hold fire.

Similarly, the hypothesis of a fire originally fed by the fuel or hydraulic fluid was deemed unlikely due to the location of these circuits and verifications made after the accident.

3.1.2 Although witnesses directed research operations on the rest rooms themselves, the possibility of a fire in the space between the ceiling of the habitable sector of the above-defined critical zone and the fuselage was not eliminated.

Several electric cable systems pass through this space, parallel to the plane's axis and on either side of the symmetrical plane. The only cables carrying considerable power are those which supply the electric motors of the horizontal stabilizer.

The servo-trim motor, which revolves permanently when automatic pilot is functioning, absorbs three amperes per phase under 115 volts.

The motor of the manually-controlled trim absorbs 15 amperes per phase under 115 volts when the pilot activates

the control-stick switches. This motor is used intermittently and for a few seconds at a time.

The pilots found no irregularity in the depth compensation during the initial descent.

In addition, no prior incident of short-circuiting on these cable systems was found for this type of plane.

Moreover, considering the distance of these cables from combustible elements which could have started the fire, and considering the fact that the characteristic odor of heated electrical insulators was not noted, the Board feels that it is very unlikely that the fire originated in the false ceiling of the rear zone of the cabin.

3.1.3 As concerns the discovery of the smoke, precise and concordant statements from two eye witnesses are available, Messrs. CARMELINO and TERSIS.

When their attention was drawn to the port-side rest room, no flames were visible. The smoke occupied at most the upper third of the rest room. It did not appear to be issuing from any fixed place. The restroom continued to be invaded by the smoke without locating its source.

Two hypotheses may be made:

- the fire started in the port rest room.
- the fire started in the adjacent space. It developed unknown to the occupants. It was detected only when the smoke had penetrated into the port-side lavatory. This adjoins both the closet and the end starboard lavatory, symmetrical to the port lavatory.

The closet consists of two partitions perpendicular to the plane's axis, against the side of the port fuselage. A simple curtain is all that separates it from the center aisle. It has an air inlet halfway up the wall of the fuselage. Re-ventilation occurs through the passenger cabin. Any escape of smoke in the closet, therefore, would only be evident in the cabin and not in the rest room next-door.

It can be deduced that the fire did not start in the closet, but in one of the two laboratories located in the extreme rear.

### 3.2 Study Of The Risks Of Fire And The Conditions For A Fire Developing In The Extreme Rear Lavatories.

3.2.1 Since the layout of the rear lavatories is identical, the study of the possibilities of a fire is equally valid for either one.

The rest-rooms are not equipped with combustible materials. American regulations establish conditions to be met so that a fire cannot be caused easily, but there is no requirement regarding emissions of smoke.

The manufacturer states that these materials comply with standard CAR 4B-381 in effect when the plane was placed in service.

However, a flame test carried out on the flap of a waste-elimination trap door recovered from one of the forward lavatories which was little damaged by the fire, showed that this element was easily inflammable.

However, the fixtures do not constitute the greatest source of risk. The risk is present in the large quantity of paper in the form of hand-towels, napkins, seat-covers, etc.

There are three main stores of paper in the rear lavatories:

a) the cupboard located against the rear pressure bulkhead. No electric circuit passes through this space. It consists of an iron case the front of which can be lowered. This front surface is pierced by a slot, forming a distributor of seat-covers.

This cupboard is separated from the toilet by a space which is usually empty.

b) the towel-distributor, located over the sink, on the wall of the fuselage, midway in height between the sink and the lavatory ceiling. No electric circuit passes through it. It consists of a plastic, bulging drop-leaf. The drop-leaf has several openings for the distribution of various products.

c) the sink, the inside of which serves for the disposal of wastepaper. The sink unit is a coffer made partially of sheet metal and partially of wood. The rear surface, resting against the fuselage wall, is made of sheet metal. It has openings through which pass the electric cables for the toilet, the air supply of the individual blower and for the elimination of water.

This rear surface is covered by a piece of sheet metal attached to the fuselage couplings, assuring the continuity of the inner covering of the fuselage in the lavatories.

The side and top surfaces are made of agglomerated wood. The front surface is made of plastic-covered wood.

The sink itself, the bowl and its back are made of a shaped sheet of stainless steel.

A perforated center partition divides the sink unit into two compartments.

Under the sink bowl there is the electrical box, an electrical control box and a water-heater protected by sheet metal.

This space is also the receptacle for used papers. These are normally thrown through a trap located over the back of the sink and accumulated under the sink. There is no wastepaper basket strictly speaking, probably because of the pipes and cables which pass through this area. There is only a bin, 5 cm high, protecting the lower part of this compartment.

The compartment next to it is occupied by metal drawers used as receptacles for paper bags. These drawers are filled through traps located on the front surface of the sink unit, and are removed through the other compartment.

There is no electrical installation in this second part of the sink unit. It should be noted that this second part does not extend as far as the pressure bulkhead.

The presence of reinforcing corner plates, to the right of the coupling of the rear dome, creates a horseshoe-shaped space common to both rear lavatories and which is unusable. This space extends from the floor of the port lavatory to the floor of the starboard lavatory, passing through the ceiling of both lavatories.

This space is separated from the lavatories by a light plastic-covered wooden fixture. The cables previously mentioned pass through the ceiling on their way to the tail cone. Laterally, the only piece of equipment is the loudspeaker for passenger announcements.

The partition dividing the sink unit and this space is perforated with a hole approximately 15 cm in diameter.

3.2.2 The risks of fire are increased by the fact that easily ignitable materials exist near a possible hot point.

The focal points of heat considered are either electrical in origin or the result of a human failing, such as carelessly throwing away a lighted cigarette butt.

Prior known incidents of electrical origin on the B-707, other than the problem of the heating rods which became known after the accident, involve the following points:

- Power supply for the razor
- Power supply for the fluorescent lighting of the mirror
- Power supply for the toilet flushing motor.

Except for the cabling of the razor socket, these circuits are not near easily inflammable items.

Examination of the location of combustible items reveals that the three storage areas for paper show different risks of fire.

It would appear difficult for the two paper distributors to become ignited electrically.

In addition, it is easy to throw a cigarette butt into the distributor located over the sink [sic], but much more difficult to do so in the distributor located over the toilets.

Moreover, the piling up of papers in the distributors does not facilitate combustion.

On the other hand, in the area used to throw soiled papers, all of the conditions are present for a cigarette butt or electrical incident to trigger a fire, the seriousness of which depends on the volume of papers accumulated therein.

In this particular accident, involving a long flight (11 hours) with almost total occupancy of the tourist class section (97 passengers out of 109 available seats), it can rightly be supposed that the space used to dispose of papers was full.

This long voyage also allows the possibility that many of the used paper towels had had time to dry. The air, which is normally extremely dry during flight, is heated inside the sink unit by the heat losses of the water-heater.

Investigations following the accident of the PP-VJZ revealed that space used for disposing of papers often contained cigarette butts. This would seem to indicate that the

ashtray placed on the front surface of the sink unit was not adequately visible.

In summary, the risk of fire has been established as follows:

- Distributor over toilet: low risk
- Distributor over sink: average risk linked with passenger carelessness
- Trash-disposal space: high risk, both in the eventuality of passenger carelessness as well as in the eventuality of an electrical incident.

3.2.3 During pressurized flight, the air circulates in the lavatory as follows: the air arrives partly from the individual vent, in part from the ceiling, in part from the center aisle. It is evacuated from a collector located on the level of the toilet seat and eliminated directly to the exterior.

If fire breaks out in one of the distributors, not only would their structure prevent the smoke from escaping elsewhere than in the lavatory, but the forced ventilation could only bring the smoke back.

It should be pointed out that the forced ventilation did not contribute to the propagation of the fire in its initial stage.

The fire in the sink unit has different characteristics. The volume of air in the unit and the wrinkling of the paper favor an extremely rapid development of the fire. This could develop in three different directions:

- upwards toward the trash-disposal trap
- laterally, toward the case containing the loud-speaker
- downwards if the sink's plastic drain pipe (depressurized) is perforated.

It should also be noted that the flexible piping connecting the individual vent to its supply piping is made of flexible rubber. It could rapidly deteriorate and create a current of air directly on the source of the fire.

### 3.3 Discussion And Hypotheses Retained

#### 3.3.1 First hypothesis: Fire in the port lavatory.

The fact that the passenger was leaving the port lavatory indicates that the smoke had just begun to escape, otherwise she would not have entered the lavatory.



If the fire originated in this lavatory, this would signify that it had just started.

It is difficult to imagine that if the source of smoke originated from one of the distributors, it could not have been located and that no flames were quickly seen.

It is more likely that the smoke originated from a fire in the sink unit. The supposed short-circuit of the "Return to seat" circuit would corroborate this hypothesis (see page 29).

One of the few objective indications consists of the stoppage of the recorder the supply of which passes through the ceiling of the starboard lavatory, then in the unused space common to both lavatories and located over the toilets.

In order for this electric circuit to be cut off by fire in the port lavatory—which occurred almost at the same time the crew was signalling to ATC that there was a fire aboard—the fire had to advance very rapidly in the unused space and damage the cabling.

This appears doubtful, since there is little combustible material in this area, and the draft is limited as long as the case's fixture is still in place.

### 3.3.2 Fire in the starboard lavatory.

The survivors indicated that the door of the starboard lavatory was closed when the smoke was discovered, and that no one opened this door thereafter.

It is certain that during pressurized flight and provided that not too much smoke escapes, no odor, and therefore no smoke would be detectable in the cabin if fire broke out in a closed lavatory.

The time factor, which is especially troublesome in the hypothesis of fire in the port lavatory, is no longer a problem in the hypothesis of a fire in the starboard lavatory.

The examination of the partitions of this forward lavatory, which are of the same type, shows that they resist fire well.

It is therefore possible that, when the smoke filtered into the port lavatory, the development of the fire on the starboard side was substantial. The ceiling of this lavatory is not highly resistant to fire. It can be thought that the fire

was already developing in the false ceiling, and this better explains why the recorder stopped.

The fact that there was little escape of heat in the port lavatory favors this hypothesis.

The violent invasion of smoke in the center aisle between the lavatories corresponds to the breakage of the vent shafts supplying the ceiling vent for this aisle.

The advance of the fire toward the front can be explained by the presence of lifesaving equipment above the galley area, and by the nature of the cabin ceiling, made of moulded plastic.

Although the hypothesis of a fire originating in the port lavatory cannot be definitively excluded, it is more probable that the fire started and developed in the rear starboard lavatory, most likely in the sink unit.

### 3.4 Action Taken By The Crew

Mechanic DIEFENTHALER, who was not on duty at the time the smoke was discovered, played an important role in the fire fighting effort undertaken by the cabin personnel as well as the cockpit personnel in an attempt to prevent further development of the fire.

Although the cabin personnel intervened quickly with fire extinguishers, their efforts were to no avail, since the source of the fire was never located.

The hypothesis of a fire originating from an electrical incident was plausible. The cutting off of all rest room circuits and the generation of non-essential power were logical steps to take.

Increasing the altitude of the cabin is the recommended method for accelerating the evacuation of smoke. This was done.

Despite this, the smoke continued to advance. This progression, which was uneven in the cabin, led naturally to the suspicion that there was a problem originating in the air-conditioning system. Examination of the wreckage shows that the emergency procedure for smoke emission from the air-conditioning system had been begun.

The rapid development of events led the cockpit personnel to apply successively and partially, procedures relating

to various hypothesis and which were thereby not totally consistent. When this fact is considered, it may be seen that the actions of the crew were well-founded.

The crew's decision not to place the passengers' oxygen harnesses in service was the object of a special examination. Beside the fact that these harnesses lead into the rest rooms, their flow rate could have worsened the situation. The use of the masks would not have protected the passengers from smoke poisoning, since these masks discharge a mixture of pure oxygen and ambient air. The emergency instructions, then, justifiably do not provide for the use of oxygen in the case of smoke.

In addition, the tests performed by Boeing showed that opening the side windows did not improve the situation in the cockpit for a case of smoke originating in the fuselage. It was recognized, however, that when these windows were opened, the smoke was so thick in the cockpit that the instruments were no longer visible. Opening the windows allowed visual piloting, making the forced landing possible.

### 3.5 Medical Observations

Coefficients of carbon monoxide poisoning equal to or higher than 66% are sufficient in themselves to explain the death of 78% of the victims.

Coefficients ranging between 50 and 60% constitute possible, but not certain cause of death of 9% of the victims.

Lastly, in 13% of the cases, a coefficient under 50% does not make it possible to attribute death to carbon monoxide poisoning.

The probable cause of death in these cases is an inhibiting reflex to fluorhydric and chlorhydric acids.

The especially high rate of poisoning is noteworthy for those victims known to have been seated in the rear, in the passenger cabin. Mrs. Elvira STRAUSS and Mr. UTERMOEHL both had coefficients of carbon monoxide poisoning of .78 and a proportion of carbon monoxide in the blood of 140 milliliters per liter.

On the other hand, the coefficient of poisoning in the blood of Mr. DIEFENTHALER, whose death in the cock-

pit was inevitably instantaneous, was .37, with a proportion of carbon monoxide in the blood of 90 milliliters.

It was an intermediate coefficient, but one that was sufficiently high to cause death that was noted in the case of BALBINO, whose body was found in the first class galley, and who was perhaps still breathing after the crash (.66 and 130 milliliters of carbon monoxide).

It should be emphasized that the affinity of hemoglobin for carbon monoxide is much greater than for oxygen. Thus, hemoglobin in the presence of a gaseous mixture including 220 volumes of oxygen and 1 volume of carbon monoxide will fix half of each of these gases. When the gaseous mixture has saturated the hemoglobin, we find equal quantities of carboxyhemoglobin and oxyhemoglobin.

The presence of one volume of carbon monoxide for 500 volumes of air (1/500 of carbon monoxide in the air) will cause death in a few hours.

The presence of one volume of carbon monoxide for 20 volumes of air (1/20 of carbon monoxide) will cause death in 15 minutes.

The coefficient of carbon monoxide poisoning using the method of NICLOUX and BALTHAZARD is the ratio carboxyhemoglobin: total hemoglobin.

A coefficient of .10 and .20 causes some shortness of breath.

A coefficient of .30 to .40 causes headaches.

A coefficient of .40 to .50 causes fainting.

A coefficient of .50 to .60 causes convulsions.

Coma and death result when the coefficient is over .60.

#### 4. CONCLUSIONS

##### Established Facts

4.1.1 The plane's certificate of air worthiness was valid, and the maintenance of the plane had been carried out in conformity with the regulations in force. The structure of the plane, its controls, tail and rudder units, its engines, weight and load distribution played no part in the accident.

4.1.2 The crew possessed the licenses and qualifications required for this flight.

4.1.3 During the approach, the fire started in the cabin, specifically in the rear lavatories.

4.1.4 Although the crew took action as soon as smoke was discovered, their actions had no effect, since the source of the fire could not be located.

4.1.5 The spread of smoke was extremely rapid, and made the situation untenable, obliging the pilots to effect a forced landing, 5 kilometers from the runway.

The plane was destroyed by fire on the ground, despite the rapid intervention of the firefighters.

4.1.6 No pre-existing anomaly which could explain the origin of the fire was discovered on the plane's equipment. There was no sign of foul play.

4.1.7 There is no evidence which would imply that the cabin fixtures did not comply with the manufacturer's specifications.

4.1.8 Doubt does exist, though, on the conformity of Boeing specifications to standard CAR 4B. On the one hand, some of the samples taken in the cabin were found to be easily inflammable. On the other hand, the receptacles for used papers did not meet the requirements of paragraph d) of CAR 4B 381; they were not capable of preventing the development of a possible fire.

4.1.9 The forced landing was successful insofar as it could be. All occupants whose seat belts were fastened normally could easily support the plane's de-elevations. Only the crew member, not wearing a seat belt, was killed by the impact.

4.1.10 Even though the doors and exits were not blocked, only the occupants of the cockpits and two stewards who were forward of the passenger cabin were able to escape from the plane by their own means.

4.1.11 The analyses conducted revealed that a high proportion of fatalities could be attributed to carbon monoxide poisoning. Analyses performed on the mechanic killed by the shock of impact make it possible to affirm that at that time, carbon monoxide poisoning of the occupants was sufficient to prevent them from acting.

4.1.12 Over 75% of the deaths were due to carbon monoxide. Most of the other fatalities appear to have been

caused by suffocation after the inhalation of other toxic gases.

### Probable Cause

The probable cause of the accident is a fire which appears to have broken out in the sink unit of the rear starboard lavatory. The fire was detected after smoke had penetrated the contiguous port lavatory. The fire could have been caused by either an electrical incident or by passenger carelessness.

The difficulty in locating the source of the fire rendered the intervention by the cabin crew ineffective. For their part, the cockpit personnel had no means available to them from the cockpit for taking effective action against the development of the fire and the invasion of smoke.

The absence of visibility in the cockpit resulted in the decision by the crew to effect a forced landing. At the moment of contact with the ground, the fire was confined to the rear lavatory area. The occupants of the passenger cabin were more or less poisoned by carbon monoxide and other combustion products. After the plane had come to a halt, the fire grew and spread toward the forward part of the plane, with the result that the crew, themselves injured or poisoned, as well as those arriving first at the scene, were unable to evacuate the passengers.

Chairman of the Board of  
Inquiry

R. LEMAIRE

General Engineer, Civil  
Aviation

P. CAROUR

Vice-President of Civil  
Aeronautics

Medical Council

DR. C. GIGNOUX

Vice-Chairman of the Board  
GENERAL M. MARTINET

Check pilot, Head of Flight  
Control Agency

P. TESTU

Chief Engineer, Civil Aviation  
P. GUILLEVIC

Aircraft Commander for Air  
France  
[Illegible]



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-78-0914-WPG

EMMA ROSA MASCHER; ALFRED ROSA; GUIDO ROSA;  
RAYMOND ROSA; BRUNO ROSA; CORIDO ROSA; AND ERNEST  
ROSA, Individually and as Heirs and Legatees for EILO  
ROSA, DECEASED, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

---

AFFIDAVIT OF ERNEST ROSA

Ernest Rosa, of legal age, a citizen of the State of New York residing at 91-18 163rd Avenue, Howard Beach, New York appeared before me, a notary public of the jurisdiction and upon being sworn did depose and say:

1. This affidavit is given pursuant a lawsuit filed by my brothers, my sister and I for the wrongful death of our brother Elio Rosa as a result of a fire which occurred on board a Boeing 707 aircraft as it approached Orly Airport, Paris, France, on July 11, 1973.

2. My brother, though an American citizen, and employed by an American firm as an engineer, resided in Europe for the 20 years prior to his death and during that period frequently flew on company business.

3. During the period of time that the French built "Caravelle" had several tragic accidents we discussed aircraft safety with him during one of his visits to the United States.

4. At that time none of us had ever flown in an airplane and all of us were apprehensive about his safety and that of his wife during his many plane trips all over the world on company business.

5. He assured us that he had complete faith in the American planes on which he flew, that he would never fly on foreign built aircraft, including the Caravelle, because he



doubted that the foreign planes had the same rigid government inspections as did the American planes.

6. This subject was discussed almost every time he came home to New York for a visit.

7. I am of the opinion that my brother and my sister-in-law consciously and purposefully insisted on travelling on American built airplanes because of what they thought were very rigid and thorough-going government inspections.

And further your deponent sayeth not.

/s/ Ernest Rosa

ERNEST ROSA

Sworn to before me this 1 day of December, 1980

/s/ Russell L. Hull

RUSSELL L. HULL

*Notary Public*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 78-914-WPG

EMMA ROSA MASCHER, ALFRED ROSA, GUIDO ROSA,  
RAYMOND ROSA, BRUNO ROSA, CORDIO ROSA, AND ERNEST  
ROSA, Individually and Heirs and Legatees, of ELIO ROSA,  
DECEASED, ET AL., PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, DEFENDANT.

---

Case No. CV-76-0187-WPG

S. A. EMPRESA DE VIACAO AERA, RIO GRANDENSE  
(VARIG AIRLINES), PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT.

---

AFFIDAVIT OF MELVIN CRAIG BEARD

MELVIN CRAIG BEARD being duly sworn, deposes  
and says:

1. My name is MELVIN CRAIG BEARD and I am Director of Airworthiness of the Federal Aviation Administration (FAA), Washington, D.C. The Office of Airworthiness is the FAA national headquarters organizational element responsible for the development of regulations, policies, and field programs relating to the airworthiness, including type certification, of civil aircraft on the United States Civil Aircraft Registry and for export to other countries. The scope of my functions include aircraft design approval, manufacturing quality control systems approval, individual aircraft airworthiness approval, the development of aircraft maintenance performance standards, and the certification of airmen, air agencies, and operators programs relative to the continued airworthiness of civil aircraft. I am a registered aeronautical engineer (Professional

Engineer Certificate No. 23927, Texas) and have been involved with the type certification of civil aircraft since mid 1955. I became employed with the FAA in type certification work in early 1965 and have held several positions since with progressive levels of responsibility in type certification for both general aviation and transport category aircraft. I have been Director of Airworthiness since the Office of Airworthiness was established in late 1979. Additionally, I am the United States member of the International Civil Aviation Organization (ICAO), Airworthiness Committee. I have personal knowledge of the matters stated herein except for those matters stated upon information and belief, which matters I believe to be true. I make this affidavit in support of the UNITED STATES MOTION for SUMMARY JUDGEMENT.

2. This affidavit is made to describe the FAA's airworthiness assurance programs as they exist today and as I understand they existed at the time the Boeing Aircraft Model 707 series aircraft were certificated.

3. Section 603(a) of the Federal Aviation Act of 1958 (FAA Act) (49 USC 1423) empowers the Secretary of Transportation to issue type certificates for aircraft. The Secretary of Transportation is required to make, or require the applicant for type certification to make, such tests during manufacture and upon completion as the Secretary of Transportation deems reasonably necessary in the interest of safety. It has been my experience since employment with the FAA that the applicant is required to make all tests leading to type certification and that the FAA does not normally develop or conduct tests independent of those conducted by the applicant.

4. A Type Certificate constitutes FAA approval of an aircraft design in detail, and an Airworthiness Certificate constitutes a finding by the FAA that a particular aircraft conforms to a design approved under a type certificate and is in a condition for safe operation.

5. Three Certificates, that is Type, Production, and Airworthiness Certificates taken together, are intended to assure the Original Airworthiness of individual aircraft. In summary, the design is approved under a Type Certificate,

the production quality control system under which the aircraft is manufactured is approved under a Production Certificate, and each individual aircraft is approved as conforming to the approved design and as being in a condition for safe operation by issuance of an Airworthiness Certificate.

6. Once an Airworthiness Certificate is issued, the Continued Airworthiness of a particular aircraft is highly dependent upon an on-going maintenance program conducted pursuant to the Federal Aviation Regulations and the operators duties under Section 601(b) and 605(a) of the FAA Act (49 USC 1421, 1425). In fact, the safety of a particular aircraft at any point in time is as dependent upon the integrity of the Continued Airworthiness programs applied as it is upon the Original Airworthiness of the aircraft. The FAA has virtually no regulatory authority or control over the Continued Airworthiness of foreign registered aircraft, notwithstanding the fact that they or their component parts may have been manufactured in the United States.

7. In developing the minimum standards for the type certification of aircraft design and for airworthiness certification of individual aircraft, it is assumed that the aircraft will be operated and maintained with a high level of integrity. In fact, Section 601(b) of the FAA Act (49 USC 1421) stipulates that in prescribing standards, rules, and regulations, and in the issuing of certificates under this title, the Secretary of Transportation shall give full consideration to the duty resting upon the air carrier to perform their services with the highest possible degree of safety in the public interest.

8. The FAA has no jurisdiction or authority to regulate either the Original or Continued Airworthiness of aircraft that are not on the United States Civil Aircraft Registry and that are not operated in United States airspace. A United States manufacturer, operator, or other person may lawfully sell an aircraft to a foreign entity without meeting the FAA safety regulations. Particular aircraft that have been manufactured to basic designs approved under an FAA Type Certificate may be lawfully sold and exported to foreign entities with design deviations of safety significance

that do not meet FAA Type or Airworthiness Certification requirements. The airworthiness of a civil aircraft is the basic responsibility of the State of Registry. Additionally, the issuance or non-issuance of an Airworthiness Directive by the FAA is a judgemental decision and the FAA is not required by statute to issue an Airworthiness Directive. The legal applicability of FAA Airworthiness Directives to foreign registered aircraft are likewise at the discretion of the State of Registry.

9. When a particular aircraft is removed from the United States Civil Aircraft Registry, any FAA Airworthiness Certificate previously issued to the aircraft becomes invalid. United States Registration is a condition for FAA Airworthiness Certification (14 CFR 21.173).

10. Pursuant to Public Law 89-497 (1 USC 113), or previous statutes, the United States Government has entered into about 23 agreements with other countries to facilitate the reciprocal acceptance of certificates of airworthiness for import aircraft products and components, commonly referred to as Bilateral Airworthiness Agreements. Such an agreement was effected between the United States of America and Brazil by an exchange of notes, signed by Brasilia on June 16, 1976, and entered into force on the same day. In summary, relative to complete aircraft, the Bilateral Airworthiness Agreement provides that if the competent airworthiness authority of the Exporting State certifies to the competent airworthiness authority of the Importing State that a particular aircraft meets the airworthiness requirements of the Importing State, then the Importing State will honor that certification by issuing its own airworthiness Certificate. The Importing State is free to require compliance with its own airworthiness requirements. In fact it is not uncommon for an aircraft manufactured in the United States to be exported to another country with deviations from the FAA approved design, to satisfy special requirements of the Importing state. Among other things, the Bilateral Airworthiness Agreements stipulate that the competent airworthiness authorities of each Contracting State shall keep the competent airworthiness authority of the other Contracting State fully informed of

all mandatory airworthiness modifications and special instruction which they determine are necessary in respect of imported or exported aircraft. The FAA usually makes its certifications of compliance and aircraft condition to the Importing State in the form of a Class I Export Certificate of Airworthiness issued under Federal Aviation Regulations, Part 21, Subpart L (14 CFR Part 21). At the time of the subject accident (July 11, 1973), there was no Bilateral Airworthiness Agreement between Brazil and the United States.

11. The ultimate responsibility for the Original Airworthiness of an aircraft rests with the Importing State, or State of Registry, that issues its own Airworthiness Certificate and maintains the validity of the aircraft's Airworthiness Certificate through its own system for regulating Continued Airworthiness.

12. Whether or not a Bilateral Airworthiness Agreement exists with the Importing State, when requested, any exporter or his authorized representative may obtain a Class I Export Certificate of Airworthiness for an aircraft to be exported provided the export airworthiness approval requirements of Federal Aviation Regulation, Part 21, Subpart L (14 CFR 21.321 through 21.339) are met.

FAA Class I Export Certificates of Airworthiness are issued to attest to the design conformity and condition of the aircraft at the time of issuance to facilitate airworthiness certification by the future State of Registry. Exporters are not required by the FAA to obtain an Export Certificate of Airworthiness. The only way for a foreign government to be assured that a particular aircraft exported from the United States complies with an approved design and is in a condition for safe operation without conducting their own engineering evaluations and inspections, would be to acquire an FAA Class I Certificate of Airworthiness. I have been unable to find any evidence in FAA records that a Class I Export Certificate of Airworthiness was ever requested or issued to Varig operated, Boeing Model 707-345C airplane, Serial Number 19841 (Subject accident airplane).

13. If the FAA was not requested, and did not issue a Class I Export Certificate of Airworthiness for the Boeing Aircraft Company Model 707-345C airplane, Serial Number 19841, the FAA would not have had any reason to inspect or otherwise determine if the subject airplane was of a configuration in detail covered by the Boeing held Type Certificate nor, whether the airplane was in a condition for safe operation and held a current and valid FAA Airworthiness Certificate at the date of title transfer prior to removal from the United States Civil Aircraft Registry. Also, the FAA would not have had any reason to ascertain if any agency of the Brazilian Government had approved deviations.

14. The purpose of the ICAO International Standards, Airworthiness of Aircraft, Annex 8, is to facilitate the operation of an aircraft registered in and certificated by one Contracting State within another Contracting State. Annex 8 is *not* intended to provide a basis for the airworthiness certification by one Contracting State for aircraft manufactured in another Contracting State. Both the United States and Brazil are Contracting States to the Chicago Convention under which ICAO is chartered.

15. The ultimate responsibility for regulating the airworthiness of a particular airplane rests with the State of Registry, unless specific arrangements are made to the contrary. When the aircraft in question were manufactured in the United States, the FAA can and has assisted foreign airworthiness authorities in this regard; but, the FAA has neither the resources nor legal authority to assure the airworthiness of aircraft registered and operated in other countries, even if those aircraft may have been manufactured in the United States.

And further deponent sayeth not.

/s/ Melvin Craig Beard

MELVIN CRAIG BEARD

Sworn to me before this \_\_\_\_ day of January 1981



**CIVIL AIR REGULATION 4b.381(d)(1953)**

§ 4b.381 *Cabin interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

(a) The materials in no case shall be less than flash-resistant.

(b) The wall and ceiling linings, the covering of all upholstering, floors, and furnishings shall be flame-resistant.

(c) Compartments where smoking is to be permitted shall be equipped with ash trays of the self-contained type which are completely removable. All other compartments shall be placarded against smoking.

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, DC

ISSUED: SEPTEMBER 5, 1973

Adopted by the NATIONAL TRANSPORTATION SAFETY  
BOARD

at its office in Washington, D.C.  
on the 22nd day of August 1973

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FORWARDED TO:

Honorable ALEXANDER P. BUTTERFIELD  
Administrator  
Federal Aviation Administration  
Washington, D.C. 20591

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SAFETY RECOMMENDATIONS A-73-67 thru 70

A recent in-flight fire on a Boeing 707-300 (series) aircraft resulted in 124 fatalities and total destruction of the aircraft after a successful emergency landing. The in-flight cabin interior fire did not involve the aircraft's fuel but was fed by the interior's material.

Although the accident remains under investigation at the present time, and the cause of the fire has not been determined by the state conducting the investigation, the National Transportation Safety Board has been advised through its accredited representative who has participated in the investigation that the smoke origin was in the area of the aft lavatories.

The Board is also aware of and is seriously concerned over the number of in-flight fires that have occurred during the past several years as a result of ignition of flammable materials in lavatories of large jet transport aircraft.

A limited examination of such aircraft lavatories by our staff has disclosed the following: (1) no fireproof waste material containers are provided in the lavatories; (2) frequently, cigarette butts are found in waste paper containers during cleaning operations at the termination of flights; (3) waste paper fragments and other flammable materials, such as lint and dust particles, can enter inadvertently into

terminals or electrical units; (4) full-face smoke masks with emergency oxygen bottles are not provided for the cabin crew; and (5) lavatories are vented in such a manner as to exhaust any odors or smoke in the case of lavatory fires, thus precluding detection in the cabin area until a serious fire is in progress.

The National Transportation Safety Board, therefore, recommends that the Federal Aviation Administration:

1. Require a means for early detection of lavatory fires on all turbine-powered, transport-category aircraft operated under Part 121 of the Federal Aviation Regulations, such as smoke detectors or operating procedures for the frequent inspection of lavatories by cabin attendants.

2. Require emergency oxygen bottles with full-face smoke masks for each cabin attendant on turbine-powered transport aircraft in order to permit the attendants to combat lavatory and cabin fires.

3. Reevaluate certification compliance with section 4b.381(d) of the Civil Air Regulations on Boeing 707 series aircraft.

4. Organize a Government/industry task force on aircraft fire prevention to review design criteria and formulate specific modifications for improvements with respect to the fire potential of such enclosed areas as lavatories in turbine-powered aircraft operating under the provisions of Part 121 of the Federal Aviation Regulations.

The Bureau of Aviation Safety staff has briefed technical staff members from your Flight Standards Service, AFS-50 and AFS-300, as well as members of the Aircraft and Airport Operating Problems Branch of the National Aeronautics Space Administration.

If we can be of further assistance in this matter, please feel free to contact us.

McADAMS, THAYER, and HALEY, Members, concurred in the above recommendations. REED, Chairman, and BURGESS, Member, were absent, not voting.

/s/ William R. Haley

WILLIAM R. HALEY

Acting

By: JOHN H. REED

Chairman

DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C. 20590

MAY 2, 1974  
Notation 1167A

Honorable JOHN H. REED  
Chairman, National Transportation Safety Board  
Department of Transportation  
Washington, D.C. 20591

Dear Mr. Chairman:

This is in response to your letter of March 28 requesting the action taken with respect to Safety Recommendations A-73-67 thru 70.

*Recommendation A-73-67.* Require a means for early detection of lavatory fires on all turbine-powered, transport category aircraft operated under Part 121 of the Federal Aviation Regulations (FARs), such as smoke detectors or operating procedures for the frequent inspection of lavatories by cabin attendants.

*Comment.*

Airworthiness Directive, Amendment 39-1818, Docket No. 13603, was issued April 3 with an effective date of April 30. It is applicable to all transport category airplanes and requires the installation of ash trays outside of lavatory entry doors and installation of "No Smoking" and "No Cigarette Disposal" placards on lavatory and disposal containers respectively.

It also contains a requirement for briefing passengers on the lavatory smoking prohibition as well as respective inspections and any necessary corrections of container disposal and access doors for proper operation, fit, sealing and latching. Thirty days after the effective date of the AD are allowed for the briefing and inspection provisions, 60 days for placard installations and 180 days for the lavatory ash tray installations.

We have also begun a pre-regulatory study of the feasibility of and justification for a requirement for heat sensors or smoke detectors in lavatories.

*Recommendation A-73-68.* Require emergency oxygen bottles with full-face smoke masks for each cabin attendant on turbine-powered, transport aircraft in order to permit the attendants to combat lavatory and cabin fires.

*Comment.* We agree with the Board's recommendation to have full-face masks available to the cabin attendants but, as in the case of the wide-bodied jets with a large number of attendants, we do not believe it necessary that each attendant be assigned a mask. We plan to propose an amendment to FAR 25.1439(a) to clarify the requirement to provide protection from smoke and other harmful gases for appropriate crewmembers of pressurized transport airplanes. An additional amendment to FAR 121.337 is planned to specify that protective breathing equipment meet the requirements of FAR 25.1439 and that procedures be established regarding the use of 100% oxygen in a smoke/fire emergency.

*Recommendation A-73-69.* Reevaluate certification compliance with Section 4b.381(d) of the Civil Air Regulations (CAR) on Boeing 707 series aircraft.

*Comment.* An extensive investigation of lavatory waste paper containers on the Boeing 707 and other transport airplanes was conducted to determine whether the containers were in compliance with the requirements of CAR 4b.381(d) (FAR 25.853(d)). The investigation revealed some deficiencies associated with the containment provisions. The following corrective action has been taken:

a. A proposed Airworthiness Directive, Docket No. 73-NW-12-AD, was issued April 2. It is applicable to Boeing Models 707/720/727/737/747 airplanes and provides for a visual inspection and necessary replacement of all electrical appurtenances within lavatory waste containers. In addition, it provides for rework of lavatory containers. Service bulletins applicable to the Boeing 707 airplanes are SBs 1270, 1363, 1365 and 3146. The inspections must be accomplished within 300 hours and the rework within 1000 hours or 100 days (whichever occurs first) after the effective date of the AD.

b. Airworthiness Directive, Amendment 39-1818, as described above also applies to the action taken in connection with this recommendation.

c. Two proposed Airworthiness Directives were issued April 4. One AD applies to McDonnell/Douglas DC-8-20/30/40/50 airplanes under Docket No. 74-WE-11-AD. The other applies to General Dynamics Models 22/22M/30/30A airplanes under Docket No. 74-WE-10-AD. These directives will cover the inspections and necessary replacement of electrical appurtenances within the lavatory containers and assure correction of any adverse conditions.

*Recommendation A-73-70.* Organize a Government/Industry task force on aircraft fire prevention to review design criteria and formulate specific modifications for improvements with respect to the fire potential of such enclosed areas and lavatories in turbine-powered aircraft operating under the provisions of Part 121 of the FARs.

*Comment.* In addition to correcting the immediate lavatory fire protection problem, a long range program has been initiated to review fire protection needs pertinent to all areas of the airplane cabin. This program, in part, includes a Government/Industry committee established under the National Academy of Sciences-National Research Council. This committee will examine fire problems associated with cabin materials. A report is anticipated in May 1975 and will be distributed to all interested persons. This effort, along with FAA studies presently covering interior cabin materials, fire containment design, test criteria, and fire extinguishing/detection equipment needs, will form a basis for future regulatory action.

Sincerely,

/s/ James L. Dow, \_\_\_\_\_

For

ALEXANDER P. BUTTERFIELD  
Administrator

## TRANSPORT CATEGORY AIRCRAFT AIRWORTHINESS DIRECTIVE

### Volume I & II

#### *74-08-09 TRANSPORT CATEGORY AIRCRAFT.*

Amendment 39-1818. Applies to all transport category aircraft having one or more lavatories equipped with paper or linen waste receptacles, including but not limited to the following: Boeing Models B-707, 720, 727, 737, and 747 Series; British Aircraft Corporation Model BAC-1-11; Convair Models CV-880 and 990 Series; McDonnell Douglas Models DC-8, 9, and 10 Series; Lockheed Model L-1011; Aero Commander Model AC-680; Boeing Model B-377; Convair Models CV-580, 600, and 640 Series; deHavilland of Canada Model DHC-6; Fairchild Model F-27; Fairchild-Hiller Model FH-227; Grumman Model G-159; Hawker Siddeley Model HS-748; Lockheed Models L-188 and 382 Series; Short Brothers and Harlin Model SC-7; Nihon Model YS-11; Fairchild Model C-82; Convair Models 240, 340, and 440 Series; Curtis-Wright Model CW-46; Douglas Models DC-3, 4, 6, and 7 Series; Lockheed Model L-1049; Martin Model M-404 Aircraft.

To prevent possible fires that could result from smoking materials being dropped into lavatory paper or linen waste receptacles:

(a) Within 60 days after the effective date of this AD, unless already accomplished, accomplish the following:

(1) Install a placard on each side of each lavatory door over the door knob containing the legible words "No Smoking in Lavatory" or "No Smoking" to indicate that smoking is prohibited in the lavatory. The signs must be of sufficient size and contrast and be located so as to be conspicuous to lavatory users.

Note: A "No Smoking" symbol may be included on the placard.

(2) Install a placard on or near each lavatory paper or linen waste disposal receptacle door containing the legible words "No Cigarette Disposal."

(b) Within 30 days after the effective date of this AD, unless already accomplished, establish a procedure that re-



quires that, prior to each flight, an announcement be made by a crewmember to inform all aircraft occupants that smoking is prohibited in the aircraft lavatories.

(c) Within 180 days after the effective date of this AD, unless already accomplished, install a self-contained, removable ashtray on or near the entry side of each lavatory door, except that one ashtray may serve more than one lavatory door if the ashtray can be seen readily from the cabin side of each lavatory door served.

(d) Within 30 days after the effective date of this AD, unless already accomplished within 30 days prior to the effective date of this AD, and thereafter, at intervals not to exceed 1,000 hours time in service from the last inspection, accomplish the following:

(1) Inspect all lavatory paper and linen waste receptacle enclosure access doors and disposal doors for proper operation, fit sealing, and latching for the containment of possible trash fires.

(2) Correct all defects found during the inspections required by subparagraph (d)(1).

(e) Upon request of the operator, a principal FAA maintenance inspector, may adjust the 1,000 hour repetitive inspection interval specified in subparagraph (d)(1) of this AD to permit compliance at an established inspection period of the operator if the request contains data to justify the requested change in the inspection interval.

This amendment becomes effective April 30, 1974.

## FEDERAL AVIATION ADMINISTRATION

(14 CFR PART 39)

(Docket No. 73-NW-12-AD)

## AIRWORTHINESS DIRECTIVES

Boeing Models 707/720/727/737/747

## Notice of Proposed Rule Making

The Federal Aviation Administration is considering amending Part 39 of the Federal Aviation Regulations by adding an airworthiness directive applicable to the Boeing Models 707/720/727/737/747 series airplanes. Many incidents of in-flight lavatory waste container fires have been reported.

FAA reviews of lavatory designs on Boeing Models 707/720/727/737/747 series airplanes have revealed that many waste container systems exhibited a number holes, gaps and cracks within the container envelope. These openings provided numerous small air pathways leading to adjacent lavatory compartmentation and to the aircraft cabin interior. Such air pathways may tend to create larger waste container volumes than that defined by the four sided container. In addition vent tubes are physically located within the intended waste container volume. Any failure of the vent tubes could provide an added potential source of ventilating air. Examination of in-service waste container systems have revealed that with time various flammable materials such as dust, lint and wastepaper accumulate beyond the waste containers (through the gap, holes and cracks) constituting a fire potential. With the introduction of cigarette butts fires may start and propagate beyond intended container volume by virtue of the multiplicity of pathways and chimneys. Possible melting of the vent tubes introduces additional vent air to the container causing a draft by the fire and can lead to a conflagration. Such fires, although originally confined to the lavatory module, can thereby develop into uncontrollable cabin fires leading to aircraft destruction and loss of life. For the reasons mentioned above, it is considered that the ability of many of the existing lavatory waste container systems may not be able to contain within the waste container a fire which reaches substantial proportions. Since this condition

is likely to exist or develop in other airplanes of the same type design the proposed airworthiness directive would require a thorough inspection of all electrical appurtenances physically located within lavatory waste container areas for proper condition and accomplishment of lavatory rework, as necessary, in accordance with prescribed Boeing Service Bulletin instructions on all 707/720/727/737/747 airplanes.

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views or arguments as they may desire. Communications should identify the docket number and be submitted in duplicate to the Department of Transportation, Federal Aviation Administration, FAA Building, Boeing Field, Seattle, Washington 98108. All communications received on or before July 1, 1974, will be considered by the Administrator before taking action upon the proposed rule. The proposals contained in this notice may be changed in the light of comments received. All comments will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons.

This amendment is proposed under the authority of Section 313(a), 601 and 603 of the Federal Aviation Act of 1958 (49 U.S.C. 1354(a), 1421, 1423) and of Section 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).

In consideration of the foregoing, it is proposed to amend Section 39.13 of Part 39 of the Federal Aviation Regulations by adding the following new airworthiness directive.

The Boeing Company. Applies to Models 707/720/727/737/747 series airplanes certificated in all categories. Compliance required as indicated.

To reduce potential fire hazard, existing in lavatory waste containers of Boeing Models 707/720/737/747 series airplanes, accomplish the following:

(a) Within 300 hours time in service from the effective date of this AD, unless already accomplished within the last 1000 hours, visually inspect all electrical appurtenances, including wiring, terminal boxes, switches and hot water heaters physically located within lavatory waste container areas for wear, abrasion and corrosion. Remove and replace as necessary.

(b) Within 1000 hours time in service, or 100 days, whichever occurs first, from the effective date of this AD, unless already completed, accomplish lavatory rework in accordance with the following Boeing Service Bulletins, or a lavatory rework that has been found acceptable to the Chief, Engineering and Manufacturing Branch, FAA, Northwest Region:

<i>MODEL</i>	<i>SERVICE BULLETIN NO.</i>
707/720	1270, 1363, 1365, 3146
727	725-25-211
737	737-25-1096
747	747-25-2245

J. H. TANNER  
*Acting Director*  
*FAA, Northwest Region*

Issued in Seattle, Washington, April 2, 1974.

## DEPOSITION OF RUDOLF KAPUSTIN

[715] Q [MR. BOSTWICK] Did you, or the people who were doing your requests, come up with one or more regulations pertinent to the design requirements of this container area?

A [BY MR. KAPUSTIN] Yes, sir.

Q Let me hand you what you have produced in this deposition and that has been marked as Exhibit 22.8, specifically directing your attention to Section 4b.381(d) and ask you if that is the regulation that you have just referred to.

\* \* \*

[716] A Yes, sir, it is.

Q Where did that exhibit come from, if you know? Where was it obtained?

A This is just a Xerox copy of the Civil Air Regulations, Part 4b. covering airplane airworthiness, transport categories, that was in effect and applicable at the time that the Boeing airplane 707 was certificated.

Q How was it determined that this was the regulation applicable at the time the 707 was certificated?

A Well, the regulation that would apply is that [717] regulation that would be in effect at the time that the manufacturer would apply for a type certificate, when the application for the type certificate was first made.

Q The first 707?

A I don't know that, sir. It would be at the time—the regulation in effect at the time the application is made for a type certificate.

\* \* \*

Q What do you mean by type?

A For that type and model aircraft. There could be several models of the 707 models here.

Q Was an effort made by you, or anyone else at the NTSB, to determine whether that regulation that has been produced here and marked as 22.8 is the regulation that applied to the design of the lavatory trash container that was in PP-VJX?

A Yes, sir.

Q Who did that?

A I believe I did that myself.

Q Can you just describe for us how you concluded that you were looking at the appropriate [718] regulation?

A We determine from FAA records when the airplane was type certificated and when the application was made for the type certificate, and thus determine that this regulation was the one that was in effect at the time the application was made for the type certificate.

Q Had you looked up that regulation by the time you took the trip to Rio?

A Yes, sir.

\* \* \*

[740] Q All right. Now let me show you Exhibit 23.11, which you have already identified, and direct your attention to the location of the sink in the port starboard lavatory, as it relates to the toilet itself, and see if that helps you orient which of these two photographs is the starboard aft lavatory, if it is.

A Sir, according to this schematic, 25.6, that has the sink on the right-hand side of the toilet, this would be the right-hand, the starboard aft lavatory, and the 25.5 would be the port lavatory.

Q All right. Then let us re-arrange them here, and let me ask you if, in general, these two photographs represent the starboard and port aft lavatories, as you saw them in Rio, prior to their being dismantled.

[741] A Yes, sir.

Q Can you identify what this is that I'm pointing to? Can you circle it on 25.6 and tell me if you can identify that?

A I can't read it, really. It's a door of some type.

Q Do you recognize what type of door it is? Can you circle it, to start with.

Better take a look at 25.5 and circle the same thing in the other lavatory, and perhaps you can read it better.

Let's mark the one on 25.6 as RK-56, and the other one as RK-57. that's on 25.5.

\* \* \*

[792] A Yes, sir, if the passenger load was high enough, not just a normal flight, you know, if there was maximum passenger load, or a large number of passengers, it could be—could have quite an accumulation in there.

Q Did you obtain any evidence that on long [793] flights the air coming into the lavatory would dry those papers out?

\* \* \*

Q What evidence did you obtain, if any, in connection with long flights and papers in this area, with regard to whether or not those papers would be dried out over a time?

A Well, sir, the atmosphere in high altitudes is dry, anyhow, and it's warm under there, and it would normally, given sufficient time, it could dry out, yes, sir.

\* \* \*

[844] Q Now, would you look back at 25.28, and perhaps the arrow on RK-102 is in the wrong place. Can you point it out on 25.28, where the air space is, if it isn't on RK-102?

A It's the area behind here.

Q Let's draw an arrow to that and make it RK-104.

Now, at RK-104, was that air space one of the items included in the accident investigators—in the group of spaces that the accident investigators concluded could act with a chimney effect in the event of a lavatory fire?

A Yes.

\* \* \*

[856] Q What was the conclusion reached with regard to how burning through of this ventilation tube would feed oxygen to a fire?

A It would open an air supply to the back of the compartment.

[904] Q And 25.44; can you identify that?

A Yes, sir, that's the back side of a lavatory sink module.

Q Of the same unit of which the front was shown in 25.43?

A Well, I don't know whether it's the same one. It's the same type. I can't tell without—

Q Do you know whether several photographs were taken of the unit that we are looking at, that's marked "WCD" that we are looking at in 25.43?

A Yes, sir, quite a few photographs were taken.

Q Does this photograph, 25.44, represent what you saw when you viewed the teardown of this VJX?



A Of that view, it does, sir.

Q All right, can you put a circle around this item, please, and mark that RK-123?

Can you identify that for us, please?

A It's a hole.

Q Do you know what purpose it serves, if any?

A No, sir?

Q Was the Boeing representative that you gave the name of earlier, who viewed this, who went to [905] Rio for this teardown, was he around when this toilet module was removed and these photographs were being taken?

A Yes, sir.

Q Was that Mr. Elton Hall?

A Yes, sir.

Q Did anyone ask Mr. Hall what the purpose of that hole was?

A Yes, sir.

Q What was his reply, if any?

A I don't think he knew, either.

Q Why, if you know, why was there an inquiry of the accident investigators concerning that hole?

\* \* \*

[906] A Well, sir, it was, the inquiry and the investigation, and the purpose for tearing this module down, wasn't just to determine the reason for that hole, but it was to determine the reason for all the other holes, and to what extent the compartment is airtight, or it was not airtight.

Q With regard to that hole, was an effort made to determine whether that made the trash container area, that is shown here in the front view of 25.43, was an effort made to determine whether or not that hole had any effect on the airtightness, or nonairtightness of that trash area?

\* \* \*

[907] A Yes, it is part of the area. It serves as a receptacle.

Q Was an effort made by the accident investigators to determine whether, if a trash fire started in the trash container area underneath the sink of this module, whether it would probably come out that hole; the fire, that is?

A Well, sir, it's—I don't want to give any misleading answers. That hole is just part of a series of openings in the module.

Q Can you point those out to us, each of them? Can you circle them?

[908] A They're not all shown on this picture.

Q All right, we'll go through some other pictures.

How about the ones shown—are there any shown on that picture, other than RK-123?

A Well, sir, the top of the area is shown and—

Q All right, can you circle that and mark it RK-124? Let's make a mark to that as RK-124, those two circles, and any other areas.

A I don't recall what the other two holes are in this picture, but there are other pictures that depict other openings.

Q Can you then circle the other two holes that you have just referred to as RK-125, and let me ask you specifically whether you know if any of the vents or drains going into this sink area go through these holes?

A I don't recall specifically but—

Q Does it assist you to refer to 25.43 in that connection?

A No, sir.

Q How about 25.32, which you previously testified to, specifically, with regard to RK-111, which [909] you have already identified?

\* \* \*

A Well, RK-111 was one of the vents I didn't know which one it was, and I couldn't tell for certain whether it went into one of those holes.

Q Well, specifically with regard to 25.6 and RK-60, that vent eye-ball there, do you know whether or not one of those holes has anything to do with the vent?

A You mean the hole marked RK-125?

Q Well, you've got two holes there.

A The two holes?

Q Yes.

A I don't know whether those are directly [910] associated with that air outlet or not.

Q With regard to the bottom hole in RK-125, are you—specifically, do you know whether it has any connection with the sink drain hose?

A Again, sir, I can't say, with absolute certainty, without looking at other pictures.

\* \* \*

Q All right, what is the hole you have marked as RK-124 on the left?

A Sir, that's just the opening at the upper area of the module, as seen in 124.

Q Do you know what its purpose is?

A No, sir, I do not.

Q Specifically, by looking at 25.6, or anything else, do you know whether it's the hole through which the paper towels drop after deposit through RK-56?

A No, sir, I don't.

Q What about the other hole, to the right of RK-124? Can you identify that in any way?

A No, sir. It's just a hole.

Q Let me show you, in connection with these [911] holes, the 25.45, and, first of all, ask you if you can identify whether that is the same module taken at a different view.

A Yes, sir, that's a different view of the same module.

Q And does it represent what you saw during the teardown of VJX?

A Yes, sir.

Q Can you circle this item here at RK-126?

\* \* \*

Q Okay. RK-126, can you identify that for us, please?

A Yes, that's a hole.

Q Is that another one of the holes that was studied, per your recent testimony, in connection with these holes?

A Yes, sir.

Q Do you see any other holes in that photograph, that we have not already marked, that were studied in this connection?

A No, sir, I do not.

Q Does reference to these holes, by a [912] different view, refresh your recollection, in connection with what their purpose is?

A No, sir.

Q Would you circle this item, please, the item with the wire that is going into—

A This wire here?

Q Yes, this connection here. Can you identify that for us, please?

A That's the aft side of the call button and the razor outlet, electrical outlet for the razor.

Q The same thing you identified as RK-108 in 25.6?

A Yes, sir.

\* \* \*

Q Okay, we need an RK-127 on 25.45 as the back of the razor outlet.

Do you want to put an RK next to it?

In connection with your studies of other smoke and/or fire incidents in lavatories of Boeing 707 type aircraft, did you come across any information concerning whether or not there had been such incidents, the origin of which had begun in the area of RK-127?

A Yes, sir.

[913] Q And can you describe for us what information you learned in that regard?

A Just very general, that there had been one or two cases, where either fire or smoke had developed from some malfunction, or—in the razor outlet area.

Q What, if anything, that you learned in connection with those incidents, concerned waste towels or other trash getting back into that particular area?

\* \* \*

A Well, sir, I don't recall any specific association of trash or waste material with the razor [914] outlet problem.

All I do recall is that it might have been lint or fuzz, or things of that sort, associated with it, but not trash.

Q Did the accident investigators attempt to ascertain the condition of the razor outlets in the two starboard, or in the two aft lavatories, in "C" and "D" lavatories of PP-VJZ?

A Yes, sir, they made an attempt?

Q What was learned, if anything?

A To the best of my recollection, they couldn't tell. The fire damage was too severe to tell whether there was any problem there or not.

Q Couldn't tell whether the fire had originated in that area or not?

A That's correct.

Q What is this other wire here? If you can circle that for us, please, on 25.45, and mark that as RK-128? What is that, if you know?

A That's a button. It's the back end of a button. I think it's the flushing unit; the flushing control.

Q The toilet flush motor?

A Yes, sir.

[915] Q Did you learn of any smoke or fire incidents in 707's, the origin of which had some connection with that particular area, RK-128?

A No, sir, I don't recall.

Q With regard to these holes that you have circled on the two photographs, 25.45 and 25.44, can you tell us, have you now identified, at least in those two photographs, all of the holes that were studied in connection with the testimony you just gave about airtightness?

A Well, sir, I don't recall any others, unless I saw another view of the photograph showing the opposite end of RK-126.

Q Well, I don't see one here that's like that, Mr. Kapustin, so let me then ask you what conclusion, if any, was reached by the investigators concerning these holes you have marked, with regard to the ability of the trash container area beneath the sink of this module, to contain a trash fire, if it started?

A Well, it couldn't contain it?

Q And why is that?

A Because it had holes in it.

Q Was there a conclusion reached about [916] whether or not the fire would probably go out through those holes?

\* \* \*

[917] A Yes, sir.

Q And was the conclusion—

A Yes, if there was smoke or fire in there, it would probably come out of one of those holes, or all of them.

\* \* \*

[936] Q Do I understand, Mr. Kapustin, that to this date Boeing has not given you any information concerning the purpose of these holes?

A I was given information. I don't recall whether it was given directly to me or whether it was given to the French people first.

Q What information did you receive?

A That nobody was quite certain what the [937] purpose of the holes—what they were there for.

There was some conjecture as to what they were for.

Q What did you receive by way of conjecture?

A That they might have been put there, you know, for carrying purposes, hand holes to carry the unit.

\* \* \*

[1041] Q In connection with Item 2 there, where it refers to the cigarette butts, "Frequently, cigarette butts are found in wastepaper containers during cleaning operations at the termination of flights."

Does that refer to the information you received from the staff, that you have already testified to about Mr. Krause's investigation?

A Yes, sir.

\* \* \*

[1065] Q Directing your attention to Exhibit 22.8, which is the section 4b.381(d), can you tell me, and you are free to read that, and I'll just read (d) quickly into the record, which says:

"All receptacles for used towels, papers and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

I would like to ask you in what regard did the aft lavatory trash container area of the 707's, such as operated by VARIG, fail to comply with that section, in your opinion?

\* \* \*

[1069] A Well, sir, the compartment, as such, did not first of all, contain any—it was not a container. It was strictly a compartment into which the wastepaper material was allowed to fall when it was introduced by the [1070] flapper door that's up on top of the module.

Number 2, the area, in itself, if this were to be a container, contained flammable material, such as the plastic tubing for the wash water drains, the door, the large door, was of a wood composition material, which although it could have been fire-resistant, to a degree, contained fabric, trim, which was not.

The entire compartment had large holes in it. These holes, even though they wore a cover which was air-tight, would have made the entire compartment nonair-tight and completely incapable of containing any fire or smoke.

\* \* \*

[1071] Q Mr. Kapustin, in connection with the words in that regulation that refer to receptacles, "and shall incor-

porate covers or other provisions for containing possible fires," did you reach a conclusion as to whether or not this trash container area incorporated such a cover, [1072] or other provisions, that's referred to in that regulation.

\* \* \*

A Yes, sir.

Q What was your conclusion in that regard?

A That there is no cover. There's a flapper door, that was opened to put the wastepaper into the container, but there was no cover, as such.

[1204] Q Now, would you take, please, Exhibit 31, which is the english translation of the final French report that you have produced here, and would you look at Page 41, please?

A Yes, sir.

Q Would you look at the last sentence before Paragraph 3.4, which starts with the words, "Although the hypothesis," and ends with the words, "sink unit," and I request premission to read this one sentence into the record.

It reads:

"Although the hypothesis of a fire originating in the port lavatory cannot be definitively excluded, it is more probable that the fire started and developed in the rear star-board lavatory, most likely in sink unit."

Mr. Kapustin, when you were in Paris at this meeting, did Monsieur LeMaire, or any of the othr members of the French investigators, read that statement as a part of the proposed draft?

\* \* \*

[1205] A As far as the contents are concerned, excluding some subsequent editorial changes, yes.

Q Was the substance of that sentence studied [1206] as being proposed to be put in the final report when you were at the meeting?

A Yes, sir.

Q At that time did you express disagreement with that statement?

A No, sir.

Q As a result of your work on the accident investigation in this crash, did you, at that time, agree with that statement?

A Yes, sir.

Q Do you still agree with it?



A Yes, sir.

\* \* \*

[1597] A Sir, can I explain that last answer, please?

Q Well, I would like a yes or no to this question.

\* \* \*

A The reason they relied on me was because the issue was extremely simple. It was a matter of the compartment being able to contain fire and smoke, or the compartment not being able to contain fire and smoke.

We discussed this at great length. it needed no expert evaluation. It was a simple open and shut situation, that the compartment did not meet the requirements.

Q Was not air-tight or fire-proof?

\* \* \*

Q That was the whole question.

\* \* \*

A It was not capable of containing fire or smoke.

\* \* \*

[1625] A The compartment, without going into any detailed engineering analysis, the compartment was full of holes and air spaces, and simply could not, by any stretch of the imagination, be considered capable of containing a fire if a fire were to occur in that compartment.

# [115] DEPOSITION OF RICHARD NELSON

Q [BY MR. LENHART] How would you describe the trash container?

A [BY MR. NELSON] That is the trash container.

Q The metal box down at the bottom is the trash container?

A Yes.

Q Or is the trash container the whole volume when the door is closed?

A Well, it would be the whole volume when the door is closed.

\* \* \*

[121] Q When you were in Rio was there any discussion of the purpose of those holes which we have just been discussing in the cabinet under the sink?

A I don't know what the purpose of those holes was.

\* \* \*

Q Well, my first question, was there any discussion of those holes?

A Yes.

[122] Q What was the nature of the discussion?

A General discussions. I questioned the reason for the holes.

Q Did anyone who was there know why they were in the cabinet?

A No.

Q Do you know who put them in?

A No.

Q Did there come a time when you inquired of Boeing as to why those holes were there?

A Yes.

Q At a later date?

A Yes.

Q Do you recall when that was?

A Well, there was a Boeing representative there at Rio too. I inquired first of him and then probably the latter part of August on my return I inquired to the Boeing Company.

Q Do you recall who you asked?

A I can't recall. I imagine I worked it through our liaison office there.

Q Was that Mr. Curtiss?

A Yes.

[123] Q Do you know who Mr. Curtiss was liaising with at Boeing? Would it have been Mr. Hogue?

A He would be liaising with the project design groups.

Q Do you know who was in charge of the design group that would have had responsibility for the lavatories at this time?

A No, I don't.

Q Did you get an answer from Boeing?

A No.

Q They didn't know?

A I was never told.

Q And to this day you don't know why those holes are there?

A That's right.

\* \* \*

[139] Q The exhibit 4004.2 then goes on to request, "If such areas are in non-compliance with the provisions of

(4b)381(d), we wish to know (1) what extent they are in noncompliance, (2) what methods were used to determine such compliance, and (3) what corrective action is being taken by your office and Boeing to correct known deficiencies." As a result of that request, did you undertake to determine compliance of the lavatory waste container with 4(b)381(d)?

A The lavatories at that time were in compliance with the rules as based on the original certification. We had no reason to doubt that at that time. No finding had been made of any accident investigation to dispute that.

Q I'm sorry. I don't understand your answer. I don't think it is responsive. Let me restate it. As a result of the request in this letter, which I take it was directed to the attention of your group which is ANW-212, did you or someone in your group undertake to determine whether the lavatory waste [140] containers were in compliance with 4(b)381(d)?

A Yes.

Q And who did that? Who undertook that investigation?

A Myself.

Q Did you go back and review the initial certification basis for a finding of compliance on the part of the waste containers with the terms of 4(b)381(d)?

A No.

Q Can you tell me why not?

A I was unable to locate the original testing data.

Q You were unable at any place in the FAA system to locate that material?

A That is right. My feeling was to correct the problem that I felt existed at the time, which meant the plugging of the holes and sealing gaps.

Q Did you request Boeing to provide you with data they supplied to show compliance originally with 4(b)381(d) in the certification of the 707 lavatory waste containers?

A I believe I did.

Q I take it that Boeing failed to provide you with any such data?

A I did not see it. No.

[150] A [BY MR. NELSON] ... but the container either does or doesn't contain the fire. There is no in between.

BY MR. LENHART:

Q And if it doesn't contain fire, then it doesn't comply with 4(b)381(d) in your view?

A Yes, the rule does not say that you have to conduct any tests.

Q When you say "the rule," you mean 4(b)381(d) doesn't require any test to show compliance?

A No.

Q But to be type certificated, the lavatories on an aircraft must comply with that regulation?

A Yes.

[173] Q Did you find—were you able to identify the FAA employees, if any, who had been involved in the certification of the trash containers in the aft lavatories?

A I know I was unable to identify them.

Q And I take it that you also, again my best recollection of your testimony was that you said you wrote to Boeing and they were unable to provide you with any certification?

A I am not sure if I wrote to Boeing. It could have been Orly. I might add that Renton being in so close proximity to our office, we normally dealt with them on the phone but for Everett we often wrote letters because it was thirty miles away. But I'm not sure how that was handled.

Q But the end results was—

A But I did originally want to see what the original type design data looked like.

Q And they were unable to provide you with any?

A That's correct.

[351] Q Let me quote from paragraph 3 which reads, "The questionable holes in waste container walls appeared common to all lavatories, but, here again, lack of technical design data furnished by the lavatory vendor prevented accomplishment of any conformity inspection in this regard. It is my opinion, however, that odds are extremely small that any of the items observed were not of type design. At any rate, the waste container system design observed appeared unsatisfactory from a fire containment standpoint."

Directing your attention now to that last sentence, you stated "At any rate the waste container system design observed appeared unsatisfactory from a fire containment standpoint."

Can you explain to me what you meant by that?

\* \* \*

THE WITNESS: I believe that that particular configuration that I viewed in Rio appeared, in my estimation, not likely to contain fire.

[352] MR. LENHART:

Q When you use the words "appeared unsatisfactory," was that referring to the regulation regarding fire containment in towel containers?

\* \* \*

THE WITNESS: No. Without proper testing I couldn't say whether it was unsatisfactory or not.

Q You have noted here that it appeared unsatisfactory. Appeared unsatisfactory in what sense? That it wouldn't contain a fire?

A That it wouldn't contain a fire.

Q I take it the reason that that is significant is that the regulations discussed fire containment in towel disposal containers?

\* \* \*

[354] A It was my opinion that the configuration I observed appeared unsatisfactory from the fire containment standpoint in regard to that regulation.

Q Is that the reason for your comment on the last page of this document, Exhibit 26, which reads "Further, it was my opinion that we should consider redesign of the lavatory system per defective fire containment in the waste container compartments on all Boeing model aircraft as a mandatory requirement and Boeing will be so advised"?

A I believe that paragraph is referring to the items listed in item 4 concerning the meeting at Varig facility on August 20.

\* \* \*

[413] Q Is it your understanding that as an FAA engineer involved in the certification process that your responsibility in the process is to review the applicant's data to determine whether it complies with the applicable regulations, special conditions?

A Yes.

\* \* \*

[449] Q Do you understand that paragraph to make the manufacturing inspectors responsible for identifying

any detail design feature which does not appear to comply with the pertinent regulations?

\* \* \*

Q Let me ask the witness since he is the expert on it. To whom is this paragraph addressed?

A To a manufacturing inspector who is responsible for conducting the conformity inspection that I referred to before.

Q Is he an FAA employee?

A Yes.

Q Do you understand that as part of his inspection he is responsible for identifying detailed design features which do not appear to comply with pertinent regulations?

\* \* \*

[450] A According to this guidance material he is supposed to be alert for any detail features which do not appear to comply. Then he would point these out to the engineer.

Q This notes particular attention to clearances, tolerances, ventilation and so on which would be visually apparent to the inspector?

A As part of his inspection, yes.

Q I take it when we use the term "inspection" we are talking about an actual, visual inspection of a particular component or system or section of the aircraft.

A Yes.

Q Are all of the various components of the aircraft, including the lavatories, subject to—you called it conformity inspections?

A Yes.

Q Prior to type certification?

A Yes.

Q So that if a lavatory trash container had a [451] detailed design feature which did not comply with the pertinent regulations, it would be his responsibility to notify the involved engineer or engineering section?

A If he were aware of it, yes.

Q Such an inspector was required to pay particular attention to ventilation and tolerance and so on.

\* \* \*

Q Let me direct your attention to the second sentence which says "particular attention should be given to fits, tol-

erances, clearance, interference, ventilation, drainage and suitable provisions for inspection, servicing and maintenance."

A That's right. That is what it says.

Q Would you understand those terms to require that the manufacturing inspector pay particular attention to the lavatory trash containers?

A In my opinion he should have looked at all of this in his inspection, although here again, you should probably be talking to a manufacturer inspector.

[25] DEPOSITION OF ROCCO LIPPIS

Q [BY MR. LENHARD] Do you recall when you first became involved with the type certification of the 707 aircraft?

A [BY MR. LIPPIS] At the very beginning.

Q Do you recall your first introduction or how you became aware of the certification of the 707?

[26] A Well, they made an application for a type certification which was given to the office, and the usual procedure when we receive such an application is to have what we call a preliminary type board to discuss the project, the rules, anything involved.

Q Did you attend the first preliminary type board meeting?

A I'm sure I did.

Q And that would have been for the series 100 aircraft?

A Right.

Q And do you recall that the date of that would have been?

A I don't remember.

Q What would your function have been at that meeting, Mr. Lippis?

\* \* \*

THE WITNESS: Primarily to take a look at the structure, what they were going to do, how were they going to substantiate it.

\* \* \*

When I say substantiate, I mean prove that the structure will take the required loads—

\* \* \*



[30] Q Now, you've testified that it's your recollection that you attended the first preliminary type certification board meeting?

A Right.

Q At that time what were the responsibilities given to your unit in the certification process?

A First we had them described in as much detail as they could as to what they were building, what kind of material, how they were going to substantiate it; anything we could think of from the structural standpoint.

Q In what form does that submission take?

[31] A It's a general meeting where all of the—practically the whole Aircraft Engineering Division attends and all the top industry—or not industry, but in this case Boeing engineers and chief engineers and those responsible for the various parts of the airplane such as power plant, controls, landing gear, the whole airplane.

Q Does Boeing make a formal written submission at that meeting as to what it intends and how it intends to show compliance?

A They make quite a complete description, probably supplied us with a document of some kind. I don't remember what they did.

Q In your experience in this area, what form does that initial document from the manufacturer usually take? Does it have a title?

A It probably has, but I think it's just a description of what they're going to build and gives as much details as they have available.

Q Is the copy of that circulated to all of the various units and branches in the CAA?

A Yes.

Q And it was the Civil Aviation Agency at that time?

A Yes.

\* \* \*

[45] BY MR. LENHART:

Q Could you describe the division of functions between the engineers and the inspectors?

A The inspector's primary function was to check for conformity to the drawings.

Q When you say "check for conformity with the [46] drawings," would that have been a prototype or production model?

A Production and prototype.

Q Was he also charged with the responsibility to review the item that he was visually observing to see whether it complied with the applicable regulations?

A No.

Q Do you know whether that is the case today where the inspectors are so charged?

A No. It's the engineer that's charged with compliance with the regulation, like the one we were just looking at.

Q Do you know whether the functions of the inspectors have changed since this time until the present time in general, or are they the same?

A Generally they're the same.

[53] A No.

Q I think prior to the recess the question was pending concerning whether you or someone under your direction would have been involved in analyzing the lavatory trash containers from the point of view of the containment aspects of those containers.

\* \* \*

Q Let's limit it to the fire containment aspect of those.

A That was evaluated by somebody in my section. Are we talking about the 100 now or the 300?

Q Let's talk about the 100 now.

A Okay.

Q Let me direct you back to Exhibit 2 to Regulation 4b.381(d) which says:

"All the receptacles for used towels, papers, and waste shall be of fire-resistant material and shall [54] incorporate covers or other provisions for containing possible fires."

Do you recall whether someone in your section would have been reviewing data supplied by the applicant for compliance with that regulation?

A Yes.

Q Do you recall who it was?

A No, I don't.

Q Do you recall your reviewing any such data?

A No.

\* \* \*

Q At the time that we're talking about, the certification of the series 100 aircraft, were there employees at Boeing charged with the responsibility for reviewing Boeing data for compliance with the applicable regulations on behalf of the FAA?

A Are you talking about the DER system now?

Q I don't know whether they are called that, but was there something like that at this time?

A I'm pretty sure there was, yes, and our man responsible would work with him.

Q Now, when you say "would work with him," how would those responsibilities have been divided between them? Would the DER have undertaken an initial review of the data and then forwarded it on to your man in your group?

[55] A Possibly so. And then they would probably get together and evaluate any questionable items.

Q Who would decide what was a questionable item?

A FAA.

Q Your man would decide what was a questionable item?

A Yes.

Q And do you recall at the time we're talking about, that is the certification of the 100 series, how data was transmitted by a DER to the FAA engineer? Was there another specific form that it would be transmitted with?

A I don't recall that we had specific forms at that time. But the individuals would get together quite often, sit over a table, and go over the items in detail, especially the drawings.

Q What would be the nature of the data, for example with regard to the determination of compliance of the lavatory trash containers with 4b.381(d)—

A Might be analysis or actual test.

\* \* \*

[56] (The record was read.)

Q When you say "analysis," can you describe for me what that would involve?

A Well, all the materials are fire tested before they're put in an airplane, and if they meet the minimum requirements they're acceptable. And the minimum requirement would meet the special condition.

Q You mean the regulation?

A The regulation.

Q Would the analysis take the form of a letter from the DER to the FAA engineer?

A Letter or report.

Q Outlining his analysis?

A Right.

Q Would that be a visual analysis of an actual lavatory mockup of the trash container?

A Part of it would make reference to the drawings. At least the first stage is that someone reviews a drawing that Boeing has submitted.

\* \* \*

[65] Q So everything about the 707 was new at least in the 100 series?

A Right.

Q So that it would be your answer that at least the first time around they would have been out and viewed the aircraft?

A Right.

Q Do you know whether there were other tests undertaken to show compliance of the lavatory trash containers on the 100 series with for 4b.381(d)?

A I don't remember.

Q Who would have decided whether to require such tests? Would it necessarily have been in the regulations?

A It was in the regulation.

\* \* \*

[79] Q Moving on to the document which was marked earlier as Exhibit 3, the Minutes of the Pre-flight Type Certification Board Meeting for the 707-300 series, can you describe for me the number of meetings that would be held in the course of the certification of one of these series?

A Generally on a new model there are three main type board meetings. There is a preliminary meeting, a pre-flight board meeting, and a final type board meeting.

Now, the pre-flight board meeting, this indicates that supposedly everything's been substantiated [80] and the only thing that remains to be done are to conduct the flight tests.

But there are many other type board meetings that are held when a special problem comes up or there are problems or maybe there's been a big lag, we want to get together and get up to date on many items. So it isn't just limited to three. You could have as many as you want, as many as you would think necessary.

Q Would this be called interim type—?

A Interim type boards, right.

Q And this is not one that we're looking at the Minutes of? It's undertaken before actual flight tests are allowed on the aircraft?

A Not allowed. The manufacturer's been flying the aircraft for quite a bit.

Q But off—

A Before we get on board.

Q These are for official FAA flight tests?

A Right.

Q And what's the purpose of the pre-flight type certification board?

A Have you read through these?

Q I'm asking you in general what are they supposed to do?

A To discuss any problems that exist and if they need fixing, fix them before we'll take off.

Q Do they also as part of this insure that all of the conformance inspections have been done on the [81] aircraft that are going to be flight tested?

A Oh, sure, that's essential.

Q And as of the date of the pre-flight type certification board meeting, has the FAA signed off on the compliance of all of the various items on the aircraft other than those that are directly affected by flight testing?

A You mean from an inspection standpoint?

Q No. I mean from a compliance with the regulation standpoint.

A Yes. Before they fly the airplane, everything will be signed off.

Q So what's the purpose of the flight tests? What additional review is anticipated in the course of the flight test?

A In the course of the flight test?

Q Yes.

A Well, you mean why do we fly it?

Q That's right.

A To make damn sure it meets regulation, and it's quite a thorough program.

Q What you're telling me is that you do not only static review but you also do an in-flight review of the same items?

A Same items, and very thorough.

\* \* \*

[135] Q I see. So that all the regions would interpret the same regulation in the same way?

A Right.

Q Do you recall whether there were any FAA rules, policies or interpretations which applied to the regulation we've been looking at in Exhibit 2 which would be 4b.381(d)?

A No, I don't recall. I'm sure that we followed the rule as it's listed here.

Q And what did you understand by the intent of that rule, if you recall?

A I don't recall. That wasn't my detail. That was assigned to someone else.

Q So you wouldn't have gotten involved in trying to determine what the meaning of that regulation was?

A No.

Q I take it as a general rule an FAA engineer in the process of determining the applicant's compliance with the regulation first sits down and tries to figure out what the rule means?

A Right.

Q And after you've done that, assuming that the rule is not ambiguous, you then review the data supplied by the applicant itself?

A Right.

\* \* \*

[180] Q [BY MR. SMILEY]

Q So it would be your opinion, would it not, that that 707 certification file must still be in existence?

A Oh, I'm sure it's in existence. We never destroy them.

Q And not only is it in existence, but it is actively being used by somebody in the FAA?

\* \* \*

THE WITNESS: I'm not sure.

BY MR. SMILEY:

Q Okay. You spoke of the central file, Mr. [181] Lippis, as being a location somewhere in the area. Do you know what the address of that file is?

A No, I don't.

Q But it's your understanding that it's somewhere in the greater Los Angeles area?

A Yes.

Q I believe you testified, Mr. Lippis, that essentially your job did not change when the Federal Aviation Agency was created sometime in 1958?

A No.

Q "No" it didn't change, or "no" I'm wrong when I say it?

A No, it didn't change. My duties were the same.

Q Did you have before the creation of the Federal Aviation Agency in 1958 a position classification description?

A Yes.

Q And did that position classification description remain essentially the same when the agency came into being in 1958?

A I believe it did.

Q And then when the agency was done away with and the Federal Aviation Administration was substituted for it, did your duties nonetheless remain essentially the same.

A They did.

\* \* \*

[200] Q [BY MR. SMILEY] Why don't you read what has previously been marked as Exhibit 2 in this deposition, CAR 4b.381(d)?



A "All receptacles for used towels, papers, and waste shall be of fire-resistant material and shall incorporate covers or other provisions for containing possible fires."

Q Okay.

A That's completely clear.

Q Completely clear, isn't it?

A Yes.

Q And if a waste container did not or could not contain any possible fires, then it would not be in compliance with CAR 4b.381(d), would it?

A No.

[156] DEPOSITION OF ROLAND CURTISS

Q [BY MR. LENHART] My question: Do you specifically recall an FAA employee looking at the lavatories?

A [BY MR. CURTISS] Specifically recall, no.

Q But you did accompany them when they inspected the aircraft?

A [Nods affirmatively.]

\* \* \*

[93] DEPOSITION OF JACK BULMER

FURTHER EXAMINATION

BY MR. LENHART:

Q Do you have any recollection today, Mr. Bulmer, of what you did in the process of approving the 707 lavatory trash containers for compliance with 4b.381(d)?

A [BY MR. BULMER] No.

Q You don't have any recollection of reviewing drawings or data submitted by Boeing?

A No, I don't.

Q Do you have any recollection at all of inspecting the lavatory trash containers?

A No.

Q You said that you agree with Mr. Lippis's description that you had the primary responsibility for determining compliance of the lavatory trash containers with CAR 4b.381(d).

Do you know today whether compliance of the 707 lavatory containers with CAR 4b.381(d) was determined by a DER or by yourself?

A No.

Q Do you recall anything about your work on the lavatories in the 707 aircraft?

A No.

Q Do you recall anything about your work in any other areas on the 707?

A No.

[16] DEPOSITION OF HAROLD TANKE

Q [BY MR. LENHART:] Mr. Tanke, you're appearing here today pursuant to a subpoena that was served on you; is that correct?

A [BY MR. TANKE] Yes.

Q And that subpoena had attached to it a list of categories of documents which you were requested to bring with you?

A Yes.

Q Do you have any of those in your possession?

A None.

Q All of the records that you would have generated or used when you were with the FAA remained there when you retired?

A That is correct.

MR. LENHART: I'd like to have the subpoena and the attached request for documents marked as Exhibit 1 to the Tanke deposition.

(Plaintiff's Exhibit No. 1 was marked for identification.)

BY MR. LENHART:

Q When you started with the FAA in 1958 in the Western Region, what did you begin to work on?

A The Convair 880.

Q Did you have any involvement in the 707 program?

A None.

RECORD OF VISIT TO RIO de JANEIRO,  
BRAZIL—Aug. 16 thru Aug. 20/73  
R.W. NELSON, ANW-212

VARIG 707-345C Accident—Orly, Paris, July 11/73

PURPOSE: To physically examine interior of sister ship of subject aircraft, including area of suspected ignition source, to confirm that no modifications to aircraft systems beyond that for which originally certificated or refurbished per Boeing Service Bulletin No. 3014 (New Look Interior) had been accomplished. Further, to evaluate extent of bulletin accomplishment per interior materials and determine flammability characteristics of all materials installed for the refurbishment—Boeing and Varig.

1. *Meeting at Varig facility—August 16/73*

The original plan was to inspect the torn down interior, this date, to ascertain that no wiring or hydraulics had been subjected to any modification. However, it was reported that the particular aircraft scheduled for this inspection was presently grounded in Los Angeles awaiting necessary engine change. Aircraft was on scheduled run from Tokyo to Rio, via Los Angeles and it was anticipated that the aircraft would be available for this inspection on Sunday, August 19. A meeting was scheduled this date, in lieu thereof, to discuss highlights of the accident, flammability requirements, and establish a plan of attack for the time available here in Rio.

The following participants were present:

F. Monako, (FAA (IFC-RIO)—R. Kapustin, NTSB—L. Gueritot, French authority—J. Hall, TBC—P. Traynor, TBC—H. Morsch, Varig—L. Martins, Varig—Maj. Carlos, Brasil authority. R. Nelson, FAA.

Highlights of the accident were discussed. Flammability requirements for the kit refurbishment materials were mentioned, and Varig discussed standards used for testing of materials that were exceptions to TBC recommenda-

tions. The Varig test specification documentation referred to CAR 4b and FAR 25 interior requirements, and revealed that all materials that were exceptions had been tested to the pertinent second level flammability requirements contained in FAR 25.853 amendments 15 and 17.

I proposed that all materials used throughout the Varig interior should be subjected to flammability tests conducted by TBC under FAA jurisdiction, with all interested parties concerned, such as Varig, the French authority, and NTSB present, as desired. Those tests would be conducted to the pertinent flammability test criteria required by certification. It was emphasized that this would be the only practical way to go with one agency testing all materials to the specified requirements, rather than various tests conducted and not necessarily to the certification requirements. The proposal seemed to meet favorable response. The NTSB mentioned this would be entirely up to the FAA and the French, who had earlier requested test specimens from Varig for burn testing. NTSC mentioned certain areas of concern we should be considering for the forthcoming inspection, which focused primarily on the lavatory system and fire containment therein. It was agreed by Varig that the interior would be modified in such way that the interior wall panels and ceiling would be removed from a station forward of the aft entry doors extending aft to the pressure bulkhead, time revealing all pertinent wire bundles and miscellaneous plumbing, as exposed. In addition, lavatories would be broken down and removed as we desired. Also, all aft galleys would be removed. It was decided to inspect various other 707 models the following day to ascertain condition of various waste containers particularly on those aircraft immediately returning from rather long, extended trips such as from New York, Los Angeles, Paris, etc.

The Varig modification system was discussed and Varig mentioned that any modification to this aircraft was covered by a D.T. form similar to an engineering order. These forms were located in Porto Alegre and not available, however, Varig stated that they would supply pertinent forms to FAA, NTSB, and French as desired. Unfortunately, this material will have to be deciphered as they are written in

Portuguese. Boeing offered to supply all pertinent Service Bulletins. Varig mentioned the fact, that since the accident they had installed new placards in all lavatories requiring NO SMOKING and that they had disconnected the heater in the waste container compartment, as well as removed the circuit breaker. They plan on installing an additional ash tray on the counter adjacent to the sink and more readily discernable than the existing one. It is felt this may discourage the occupants from throwing cigarette butts and materials down the trash chute.

*2. Inspection At Varig Maintenance facility—Aug. 17/73*

We inspected the other sister ship, which was preparing for a trip to Rome and was being converted from a mixed passenger configuration to all passenger. Noted in the aft right hand lavatory, towels were plugging the trash chute and heater baffle. There had been an earlier question as to where the portable oxygen bottles were located in the Varig configurations. It was observed on this particular aircraft, that there were six such bottles, mounted vertically (in the aft left hand coat closet) adjacent to the lavatories. It was learned there were four such bottles on the ill fated aircraft. This was the original location, as Varig had relocated the bottles from another position forward and had returned them to this position just prior to the accident. It was noticed in the lavatories that the heater installed just below the sink in the waste container compartment tended to become somewhat of a catchall for objects such as toothbrushes, metal toothpaste containers, paper towels, plastic combs and containers. On being dropped into the container, they would become wedged in between the heater and the heater guard panel. It was also observed in the waste container area of most lavatories that there were numerous holes through the vertical panels between compartments leading to other compartments, and in some cases to the aircraft skin. This created an interesting revelation and it was not clear how the waste containers could possibly contain fire, as required by CAR 4b.381(d) and FAR 25.853(d).

We inspected two Varig 707 and the condition seemed to be very similar in all cases, what with towels plugging

trash chutes and miscellaneous debris wedged between the heater and the heater guard as previously mentioned. In addition, we boarded a PAA 707, which was there on a quick turn around, and observed the same situation in the aft lavatories, one of which was jammed with paper in the trash chute.

### 3. *Inspection of Varig 707-345C (PP-JX)*

With portions of the aft ceiling and wall paneling removed and aft galleys and lavatories removed, all exposed wiring and plumbing were inspected as well as lavatories. However, due to lack of type design data, we were unable to ascertain whether it was original equipment. Further, due to lack of modification records, it was not known whether any modifications had been accomplished. The questionable holes in waste container walls appeared common to all lavatories, but, here again, lack of technical design data furnished by the lavatory vendor prevented accomplishment of any conformity inspection in this regard. It is my opinion, however, that odds are extremely small that any of the items observed were not of type design. At any rate, the waste container system design observed appeared unsatisfactory from a fire containment standpoint. In addition, considerable dust and lint particles were observed in and around wire terminals. This included the shaver outlet connection, which was subject to a recent AD action. It is considered that such a collection of foreign matters appears hazardous. All critical areas and exposed materials were photographed and copies will be forthcoming on development by Varig.

### 4. *Meeting at Varig facility on August 20/73*

Participants at this meeting were as follows:

R. Nelson (FAA)—R. Kapustin, (NTSB)—L. Gueritot, French authority—L. Martins, Varig—H. Pisco, Varig—H. Morsch, Varig—T. Traynor, TBC—J. Hall, TBC—O. Schmiedt, Varig.

The results of the inspection were presented to Varig and the NTSB came up with some recommendations to FAA and Boeing as follows:

1. Investigate smoke evacuation procedures.

2. Investigate feasibility of stewards or stewardesses conducting physical checks in the lavatories for smoking.

3. Investigate possibility of installing smoke masks in lavatories.

4. Investigate feasibility of installing smoke detectors in lavatories.

5. Consider redesign of lavatory waste container systems, per fire containment requirements of CAR 4b.381(d) for this 707.

6. Regarding heaters in waste container compartments, investigate temperatures and determine whether presence of wet towels on thermo couples might not be allowing higher heater temperatures to exist.

7. Consider redesign of heater guards in waste container compartments.

8. Are the means of extracting smoke adequate?

Regarding those recommendations, the NTSB was advised that action had been previously initiated on all items, except the better thermo coupling question with TBC.

Furthermore, it was stated that on return from Rio, it was my intention to press TBC for immediate answers. Further, it was my opinion that we should consider redesign of the lavatory system per defective fire containment in the waste container compartments on all Boeing model aircraft as a mandatory requirement, and Boeing will be so advised.

It was mentioned by the NTSB and French, that suspected area of ignition source was the aft lavatories and specifically the towel waste container.

R. W. Nelson

Crashworthiness Engineer, ANW-212

ANW-212:RNELSON: sp: 767-2516:8/23/73

file: 8020/707



## AFFIDAVIT OF FREDERICO J. RITTER

FREDERICO J. RITTER, being duly sworn, deposes and says:

1. I am Manager of VARIG Airlines' ("VARIG") Engineering and Maintenance Base located at Porto Alegre, Brasil, where all of VARIG'S heavy maintenance, overhauls and engineering is conducted. I report directly to VARIG'S Director of Maintenance, Mr. Goetz, and am number two in VARIG'S Maintenance Department. I am an aeronautical engineer and have been with VARIG for ten years. I have personal knowledge of the matters stated herein except for those matters stated on information and belief, which matters I believe to be true, and I make this affidavit in opposition to the Motion for Summary Judgment filed by THE BOEING COMPANY (hereinafter "BOEING") in Civil Action No. C 76-169 M, W.D. Washington, entitled "*VARIG Airlines v. THE BOEING COMPANY and WEBER AIRCRAFT CORPORATION.*"

2. VARIG operates a maintenance, repair and overhaul facility in Porto Alegre, Brasil, which has been certified by the United States Federal Aviation Administration (hereinafter "FAA") as a "Certified U.S. FAA Repair Station." This means that United States "Flag" Airlines like Pan American World Airways and Braniff International can have us do contract maintenance and/or overhaul work on their aircraft. As manager, I am in charge of this base. In the course of my work I am fully familiar with the practices of the airlines with regard to maintenance, overhaul and warranties and I am also familiar with the customs and practices of the airlines and the major aircraft manufacturers with regard to the purchase and sale of new and used aircraft and the product support for these aircraft provided by the manufacturers to the airlines. I have been principally involved for VARIG in the purchase of used jet aircraft equipment from other airlines, and I am involved with the technical aspects of the purchase of new aircraft from aircraft manufacturers, including BOEING. I was involved in the technical aspects of the purchase of two "new-used" BOEING 707 aircraft—PP-VJY and PP-VJZ—from SEABOARD WORLD AIRWAYS, INC. (hereinafter "SEA-

BOARD") in 1968. PP-VJZ was totally destroyed when it crashed and burned near Paris, France, on July 11, 1973.

3. When an airline like VARIG purchases an aircraft new from a manufacturer like BOEING, there is a Detailed Specification Document (a "D.S.D.") attached to the purchase agreement as an EXHIBIT. The D.S.D. for PP-VJZ is listed as EXHIBIT A to the BOEING-SEABOARD Purchase Agreement (No. 271) dated June 2, 1967. This D.S.D. is the technical document by which the aircraft is built by the manufacturer. The idea behind the D.S.D., from the airline's standpoint, is that everything in it has been approved by the U.S. FAA. When a manufacturer like BOEING has a "type certificate" for an aircraft model, such as the BOEING 707, VARIG relies upon the fact that BOEING has completed all of the tests and other requirements laid down by the U.S. FAA, in obtaining that type certificate. VARIG neither seeks nor reviews the mass of detailed design drawings, data, tests and other documentation submitted by BOEING to the FAA when applying for such a type certificate. Such a review is completely beyond the scope and purpose of VARIG's engineering department. Similarly, when a manufacturer like BOEING has completed an aircraft which has been built pursuant to a type certificate, such as PP-VJZ, the U.S. FAA physically inspects that aircraft to see that it complies with the U.S. FAA'S Federal Air Regulations ("FAR's") before issuing the individual aircraft an "airworthiness certificate." When the airline takes delivery of the aircraft it already has an airworthiness certificate issued by the U.S. FAA and the airline just reviews the D.S.D., knowing that each item on the D.S.D., has already been approved and inspected by the U.S. FAA. The airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with the regulations. Neither does the Brazilian Government when the aircraft is registered in Brasil. VARIG relies on BOEING or the FAA to tell it the full significance of any problems which may have arisen in connection with the type certification process or any significant in-service problems which have occurred to other operators following type certification. In

the case of PP-VJZ, SEABOARD took delivery of the aircraft from BOEING and did the review of the D.S.D. In summary, the airline purchases an aircraft which it assumes was certificated to a certain level of airworthiness. Thereafter, the job of the airline's engineering and maintenance department is to *maintain* that level of airworthiness and not allow it to degrade.

4. After an airline like VARIG takes ~~delivery~~ of an aircraft from the manufacturer it relies heavily upon the manufacturer for information concerning in-service problems encountered by other operators of the same type aircraft, and for the remedies, or "fixes," for these problems. The BOEING-SEABOARD Purchase Agreement states in Article 15(b) that BOEING agrees to maintain a service organization in Seattle, Washington, to handle the Buyer's requirements for technical advisory assistance "for a period commencing with the date of delivery of the first Aircraft and continuing as long as at least ten (10) aircraft of the type purchased hereunder are regularly operated in scheduled commercial air transport service. . . ." The Air Transport Association of America ("A.T.A."), which is composed of U.S. domestic scheduled air carriers, has developed with the aircraft manufacturers a document which standardizes how technical data will be presented to the airlines by the manufacturers. This document is known as "A.T.A. Specification No. 100" and is used throughout the aviation industry both by U.S. domestic and foreign airlines. Chapter 207 of "Spec. 100" deals with the manner in which aircraft manufacturers, such as BOEING, will inform operators, such as VARIG, of these in-service problems. A true copy of pages 2-7-0 through 2-7-2 of A.T.A. Spec. 100 are attached hereto as EXHIBIT A. They indicate that the only document which a manufacturer shall use to notify the airlines of "modifications which affect performance, improve reliability, increase safety of operation, provide economy or facilitate maintenance or operation" shall be the "Service Bulletin." The A.T.A. Spec. 100 sets forth three types of Service Bulletins, depending upon the degree of urgency connected with the modification. These are: (1) Campaign Wire, (2) Alert Service Bulletin, and (3) Standard Service

Bulletins. Campaign Wires involve "matters of extreme urgency," and are transmitted by telegraph, cable or telephone. Alert Service Bulletins ("ASB's") are issued "on all matters requiring the urgent attention of the operator and shall generally be limited to items affecting safety." ASB's are prepared on light blue paper to distinguish them from Standard Service Bulletins, which are issued on white paper and which do not contain any compliance recommendations. VARIG relies heavily upon this information and these remedies from the manufacturer, because a foreign airline cannot possibly compete with the manufacturer's resources and sources of information available to it. For example, a foreign operator operating only three aircraft of one type would have to experience personally all of the possible failure modes concerning that aircraft type unless it had available to it the information concerning in-service problems sent to the manufacturer by all operators of that type aircraft. Even then, the operator would not be able to assess the significances of the failure mode it had experienced without access to the mass of data available to the manufacturer as to what result that failure mode could have on the aircraft. The manufacturer's information on in-service problems comes from reports sent by the operators to the manufacturer and/or the FAA, and from reports sent to it by its own Field Service Representatives stationed with the airline operators. BOEING has an extensive system of these field service representatives stationed with operators of BOEING aircraft throughout the world.

5. With regard to warranties on new aircraft given by a manufacturer, these are an established part of the custom and practice of the airline-aircraft manufacturing industry. Warranties are a big part of a manufacturer's sales promotion when selling a new aircraft. Each manufacturer stresses the reasonable manner in which the airline's warranty claims will be processed by it. It would be totally unrealistic to think of buying a new plane without such warranties, and I know of no instance in which that has been done by VARIG or any other airline. It is also customary to take an assignment of these warranties when purchasing a used aircraft from another airline. This is true

even though in most instances the warranties on the used aircraft have expired. The assignment is usually given because spare parts may still have warranties on them. The purchase of PP-VJZ from SEABOARD was unusual in that it involved the purchase of a "new-used" aircraft which still had a substantial warranty period to run.

6. In 1967 when VARIG became interested in buying additional long-range BOEING 707's (the model 300C series) this type of aircraft was very difficult to find. There were many used 707's and DC-8's on the market, but not many of the higher-performance, long-range 300C model BOEING 707's. Since this was the model which VARIG needed for its international routes, we became very interested when we learned that SEABOARD had purchased three of them from BOEING but had decided instead to use "stretched" DC-8's. As to 707-300C's, it was definitely a 'seller's market' in 1967-68.

Dated: November , 1976.

/s/

\_\_\_\_\_  
FREDERICO J. RITTER

# **CHECK LIST** **INTERIOR ARRANGEMENTS**

CAR 4b	CAM	Check For
		Installation Dwgs-Schematics
.350(e)		Door separating crew/passenger comp't
.350(f)		Lock on separating door
.356(b)	-1 to -4	Safeguard against inadvertent opening
		Openable from either side
	-3	—without power
		—with occupant crowding
		Locate and open in dark
.356(d)		Protection of passengers from propeller
.356(c)	-5	Visual inspection outward opening doors
	-6	Visual signal doors locked
.357		Door louvers closeable by crew
.358(c)	-1	Seats, berths, belts approved-TSO
.358(b)(1)		Protection from head injury by:
		1—Shoulder harness & belt, or
		2—Belt, plus elimination injurious objects,
		or
		3—Belt and cushioned head support
.358(b)(2)		Hand holds along aisle
.358(b)(3)		Projecting objects padded
.358(b)(4)		Berth and boards, corners, protuberances
.358(b)(5)		Flight crew shoulder harness provisions
.359		Cargo/Baggage comp't limit placards
		—tie down provisions
		—protect crew/pass. from injury
.362		Separate compartments
		Curtains or doors open for TO/L
.362(a)	-1	Openable from inside and outside, or
		—close proximity to passenger exits
.362(b)	-2	Proper size, slope, location
.362(c)	-3	Number and Type per table
.362(d)		One Type III above water line/side
		One exit above water line/35 pass
.362(e)	-4	Unobstructed minimum opening

		Opening means simple and obvious
		Openable inside and out
		Visual inspection means, if open outwards
		Assist devices for exits 6' from ground
		Functional test of emergency exits
.362(f)	-5	Conspicuous marking of location, access, operation
		Operating instr. inside and out
		Emergency lights installed and demon.
		—unobstructed by berths, curtains
.362(g)	-6	Passageway minimum 20" wide, and demon.
		-unobstructed during TO/L
		Assist space at door type exits
.362(h)		Aisles width 15" to 26" & 20" above
.380(a)	-2	Approved hand fire extinguishers
(c)	-1	Protective breathing equipment
.331(a)&(b)		Materials flame, flash, & fire resist.
.381(c)		Self contained ash trays
.381(d)		Fire resistant, covered waste containers
.381(e)	-1	Crew portable fire extinguisher
.381(f)	-1	Number & type of pass. comp't exting.
.605(a)		Approved seats (See 4b.358)
(b)		Approved belts (See 4b.358 & .643)
(c)		Approved port. fire exting. (See .381 & .641)
.641		Hand fire exting. (See 4b.381, .605)
.643		Approved safety belts (See .358, .605)
.644		Pilot or co-pilot operated belt sign
.645(a)		Capacity-no. of pass. plus loss of 1 raft
(c)		Long range signalling device
(d)		Approved type life jackets
.646		Equipment stowage accessible and obvious
		Stowage marked conspicuously
.646(a)		Slides, chutes, ropes, stowed at exit
.646(b)(c)		Stowage near exit
.646(d)		Life preservers within easy reach of occupant
.739(d)		Fire exting., signalling equip., etc. location mark.



THE UNITED STATES OF AMERICA  
FEDERAL AVIATION AGENCY  
TYPE CERTIFICATE  
Number 4A26

This certificate issued to The Boeing Company certifies that the type design for the following product with the operating limitations and condition therefore as specified in the Civil Air Regulations and the Type Certificate Data Sheet; meets the airworthiness requirements of Part 4b of the Civil Air Regulations:

Model 707-300 Series  
Model 707-400 Series  
Model 707-300B Series  
Model 707-300C Series

This certificate and the Type Certificate Data Sheet which is a part hereof shall remain in effect until surrendered, suspended revoked or a termination date is otherwise established by the Administrator of the Federal Aviation Agency.

May 15, 1956—Model 707-300 Series  
—Model 707-400 Series  
January 12, 1961—Model 707-300B Series  
Date of application: December 7, 1961—Model 707-300C Series  
Date of issuance: July 15, 1959—Model 707-300 Series  
February 12, 1960—Model 707-400 Series  
May 31, 1962—Model 707-300B Series  
April 30, 1963—Model 707-300C Series

By direction of the Administrator

/s/

CHARLES R. HAWKS  
*Chief, Engineering & Manufacturing Branch*

This certificate may be transferred if endorsed as provided on the reverse hereof.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-76-0187-WPG

Filed: Jan. 20, 1981

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VARIG AIRLINES

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE

(VARIG AIRLINES), PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT.

VARIG'S MOTION TO STRIKE THE AFFIDAVITS OF  
CECILE HATFIELD AND MELVIN CRAIG BEARD

DATE OF HEARING: Monday, February 17, 1981

TIME: 10:00 a.m.

Plaintiff S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE ("VARIG") moves this Court, pursuant to Rules 6(d) and 56(e) of the Federal Rules of Civil Procedure, for an order striking in their entirety the affidavits of Cecile Hatfield and Melvin Craig Beard, filed in support of the UNITED STATES' motion for summary judgment, on the grounds (1) that the affidavits were not filed with the motion, as required by Rule 6(d); and (2) that paragraphs 2 through 15 of the Beard affidavit and sentence 2 of paragraphs 3 of the Hatfield affidavit are not made on personal

knowledge, do not set forth facts which would be admissible in evidence, and do not affirmatively show that the affiant is competent to testify to the matters stated herein. Copies of the affidavits are attached as EXHIBITS A and B to this motion.

This motion is based upon VARIG's Memorandum of Points and Authorities filed in support of this motion and all other papers and pleadings filed in this action. VARIG does not request oral argument on this motion.

Dated: January 16, 1981.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 76-0187-WPG

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

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*Attorneys for Defendant  
United States of America*

**AFFIDAVIT OF CECILE HATFIELD**

I, CECILE HATFIELD, being duly sworn, hereby affirm:

1. I am an attorney at law duly licensed to practice in the Federal Courts. I am one of the attorneys for the Defendant, United States of America, charged with the responsibility of defending this lawsuit.

2. This Affidavit is submitted in support of the United States' Reply Memorandum filed in opposition to VARIG's Opposition to the United States' Motion For Summary Judgement.

3. I have personally reviewed all of the deposition transcripts and can state that the pages included are true and accurate excerpts from these depositions. I have also reviewed the Affidavit of Mr. Craig Beard and state upon information and belief that it is true and correct.

/s/

---

CECILE HATFIELD

UNITED STATES v. UNITED SCOTISH INS. Co.,  
No. 82-1350

Date	Filings—Proceedings
5-11-70	Fld Federal Tort Claims Purs to 28 USC 2675 et seq., Compl't for damages for wrongful death. Issd Summons MADE JS-5 CARD.
5-18-70	Fld return on service of writ as to Dorothy Cutler on 5/15/70
7-13-70	Fld Ex Parte Mot for extension of time to plead, and ord thereon; Ord Deft shall have to and includign 9/12/70 within which to answer. (S)
7-13-70	Fld affid of service by mail of Ex Parte Mot.
9-14-70	Fld ANSWER to compl't by Deft.
9-15-70	Fld notice of pre-trial hearing calendared for 11-27-70 at 2pm.
10-22-70	Fld notice to take deposition upon oral examination, with affid of service, of Ivan R. Stracener at San Francisco, Calif. on 12/1/70
11-6-70	Fld notice of taking deposition upon oral examination, at 10:00 o'clock A.M. on 12/4/70 in San Diego, with affid of service.
11-9-70	Fld notice to take deposition upon oral examination of Mr. Ivan Stracener at Oakland Airport on 12/1/70, and affid of service.
11-9-70	Fld notice to withdraw subpoena issd on 10/21/70
11-12-70	Fld return on Dep Subpoena as to Frank W. Schossow, Jr. on 11/9/70
11-17-70	Ent ord on court's own mot, pre-trial is cont from 11/27/70 to 12/11/70 at 2pm. (S)
12-11-70	Ent ord pretrial cont to 4-26-71 at 10am. (S)
12-14-70	Fld stipulation for continuance of pre-trial hrg to 4-30-71 at 2pm. (S)
2-1-71	Fld order transferring case under local rule 2 to calendar of Judge Powell. (S) (Powell)
2-26-71	Fld notice of pretrial conference on 3/3/71 at 3:40 p.m. (Powell)
3-3-71	Ent ord cause held pending decision as to consolidation of case with other pending cases. (Powell)

- 4-23-71 Fld plntf's notice to take deposition upon oral examination of Ivan R. Stracener of Oakland, California. Issd c.c. of Notice to take deposition.
- 5-27-71 Fld order transferring case under local rule 2 to the calendar of Judge J. CLIFFORD WALLACE. (POWELL) (WALLACE)
- 1-11-72 Fld cy of ord of Judicial Panel on Multidistrict Litigation transferring case to No. Dist. of Texas & assigned to Judge Robert M. Hill for coordinated or consolidated pretrial proceedings purs 28 USC 1407. Mld c.c. docket sheet & original file to Clerk, US Dist. Ct., No. Dist. of Texas, Dallas, Texas.
- 1-18-72 Fld c.c. opinion and order of Judicial Panel on Multidistrict Litigation directing trans of case to N. Dist of Texas, which was sent on 1-11-72 MADE JS-6 CARD Ent 1-18-72
- 5-2-74 Fld c.c. ord trans case from Multidistrict Litigation No. 80 Civil Action No. CA-3-5435-D, back to Southern Dist of Calif for fur proceedings including trial on the merits. (ROBERT M. HILL) T/W c.c. of their docket sheet and orig documents from our file. MADE JS-5 reopening case.
- 5-30-74 Fld notice of P/T hrng on 7-26-74 at 9am.
- 7-19-74 Fld Pltf's P/T memo of contentions of fact and law. T/W List of Pltf's proposed witnesses
- 7-25-74 Fld deposition of Charles H. McMillan taken 2-5-73  
Fld volume I & II of deposition of Ivan R. Stracener taken 5-5-71  
Fld c.c. of order of transmittal from Northern Dist of Texas.
- 7-25-74 Fld deposition of Gerald William Talles taken 4-19-72
- 7-26-74 PRE-TRIAL HRNG-Ent ord P/T ord to be filed and cont to 12-10-74 at 9:30 am for trial. (E)
- 7-30-74 Fld deposition of Virgil A. Hill taken 2-5-73  
Fld deposition of Arthur Harr taken 4-20-72  
Fld deposition of Paul D. Porter taken 4-20-72  
Fld transcript of proceedings of M.D.L. Docket No 80 ALL CASES



- 9-4-74 LODGED Pre-Trial Conference Order, Sent to Judge Enright.
- 9-18-74 Fld Pre-Trial conference order. (E)
- 11-6-74 Fld stipulation that the trial be set for 12-3-74 at 9am. (E)
- 11-18-74 Fld motion of the United States to add to the witness list in pretrial conference order
- 6-30-74 Fld Deposition of Douglas L. Coppinger taken 6-22-72 in Dallas Texas
- 12-3-74 HRNG MOTS Ent ord trial cont'd to 1-28-75 at 9am.
- 1-24-75 Fld substitution of witnesses in P/T ord; subs Al Young for Keith Blythe subs Gary Killian for Fred Schlesy; Subs Paul Gibson for Paul Norton (E)
- 1-24-75 HRNG MOTS—Ent rod trial cont'd to 1-29-75 at 9:30 am. (E)
- 1-27-75 Fld motion to add witness to witnesses of pretrial conference list.
- 1-30-75 Fld order for taking of depositions, and order shortening time.  
Depositions of Richard Mayne; Lieutenant W. Butt; H. Skagg and Le Roy Wolever, M.D. may be taken on 2-3-75 at 2pm in Las Vegas, Nevada; Fur ord time for service of subpoenas may be shortened to six hours. (E)  
Fld order RE service of subpoenas by any person who is not a party to the within action (E)
- 1-30-75 Fld Trial memo and statement of facts, by Deft USA
- 1-30-75 Fld affd of Lee M. Woodland; James H. Miller; Lee M Woodland and James H. Miller.
- 1-29-75 COURT TRIAL; Swore wits & fld exhs; Ent ord cont to 1-30-75 at 9am (E)
- 1-30-75 FUR COURT TRIAL Swore wits & fld exhs; Ent ord cont to 1-31-75 (E)
- 1-31-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 2-4-75 at 9:30a.m. (E)
- 2-4-75 FURTH COURT TRIAL—Ent ord swore wits, fld exhibits; Ord cont to 2-5-75 @ 9:30 for furth Trial. (E)

- 2-5-75 FURTH COURT TRIAL—Ent ord swore wits, fld exhibits, Ord cont to 2-6-75 @ 9:30 for Furth trial. (E)
- 2-6-75 FURTH COURT TRIAL—Swore wits & Fld exhs; Ent ord cont to 3-11-75 at 9:30am. (E)
- 3-11-75 FUR COURT TRIAL—Wore wits & fld exhs; Ent ord cont to 3-12-75 at 9am.
- 3-12-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-13-75 at 9am. (E)
- 3-13-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-14-75 at 9:30am (E)
- 3-14-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-18-75 at 9:30am (E)
- 3-18-75 FUR COURT TRIAL/Swore wits & fld exhs; Ent ord cont to 3-19-75 at 9:30 am Def's mot for summary judgment—denied. (E)
- 3-20-75 Fld brief of the U.S. in response to pltf's allegations concerning federal aviation regulations
- 3-19-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-20-75 at 9:30am. (E)
- 3-20-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-25-75 at 9:30am (E)
- 3-25-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 3-27-75 at 9:30am. (E)
- 3-27-75 FUR COURT TRIAL—Swore wits & fld exhs; Ent ord cont to 4-2-75 at 9:30am (E)
- 4-2-75 FUR COURT TRIAL—Swore wits & fld exhs; Judgment for Pltf; Ent ord findings etc and judgment to be prepared by Pltf; cont to 4-11-75 at 8:45 for P/T proceedings. (E)
- 4-11-75 P/T HRNG—Following Cert Trial ent ord cont'd to 5-28-75 @ 9:30 a.m. for further Crt. Trial re: damages. (E)
- 4-20-75 MOTS—Ente ord cause cont'd to 7-8-75 @ 9:30 a.m. for Crt. Trial (E)
- 6-3-75 Fld deft's supplemental interrogatories t/w affid of svc thereto.  
Fld request to produce t/w affidt of svc thereto.
- 7-7-75 Fld pluf CEARLY's—ANSWERS to supplemental interrogatories t/w affids of svc by mai.

- 7-7-75 Fld brief of USA on wrongful death damages t/w certificate of svc thereto.
- 7-10-75 LOD deft's ORD re discovery
- 7-9-75 MOTS—Ent ord con'd to 9-10-75 @ 9:30 a.m. for Further Trial re damage. Not to require ANSWERS to specific inquiries—GRANTED. Deft [illegible] ORD. (E)
- 7-16-75 Fld deft's ORD re Discovery that deft's interrogatories, fld 6-3-75, are to be answered & fld NLT 8-8-75; that the documents requested in deft's request to produce, fld 6-3-75, are to be produced as requested on or before 8-8-75. (E) t/w affidt of svc by mail thereto.
- 7-30-75 LODGED pltf's. Findings of Fact & Conclusions of Law.
- 8-13-75 Fld deft's NOT OF MOT & mot for New Trial, or in alternative, for AMENDMENT Of Judgmnt calendar'd for 9-8-75 @ 10:30 a.m. Fld MEMO in support thereof t/w affidt of svc thereto.
- 9-8-75 Fld pltf's—B/As in opposition to deft's mot for New Trial or Amendment of Judgmnt t/w affidt of svc by mail thereto.  
Fld U.S.'s Objections to pltf's' proposed Findings of Fact & Conclusions of Law t/w affidt of svc by mail.
- 9-8-75 MOTS—Ent ord hrng mot for New Trial—DENIED; cont'd to 10-15-75 @ 9:30 a.m. (E)
- 9-11-75 Fld Findings of Fact & Conclusions of Law. (E)
- 10-14-75 Fld pltf's—MEMO of P/As on Choice of Laws t/w affidt of svc by mail.
- 10-15-75 MOTS—Ent ord Trial cont'd to 12-10-75 @ 9:30 a.m. (E)
- 11-4-75 Fld U.S.' Response to pltf's' MEMO of P/As on Choice of Laws t/w certificate of svc theeto.
- 12-10-75 FUR COURT TRIAL—Swore wits, fld exhibits. Ent ord cont'd for further Crt Trial to 12-11-75 @ 9 a.m. (E)

- 12-11-75 FUR COURT TRIAL—Swore wits, fld exhibits.  
Ent ord cont'd to 12-12-75 @ 9 a.m. for further  
Crt Trial. (E)
- 12-12-75 FUR COURT TRIAL—Swore wits, fld exhibits.  
Ent ord cont'd to 1-9-76 @ 9:30 a.m. for further  
Crt Trial. (E)
- 12-29-75 Fld pltf's—MEMO of P/As re: Nevada Law &  
MEMO of P/As re: Choice of Laws t/w affd't of  
svc by mail thereto.
- 1-9-76 FUR COURT TRIAL—Swore wits, fld exhibits.  
Ent ord cont'd to 1-13-76 @ 2 p.m. for further Crt  
Trial. (E)
- 1-13-76 FUR COURT TRIAL—Ent ord Judgmnt for Pltf.  
Findings, etc. & Judgmnt to be prepared by pltf.  
(E).
- 3-17-76 Fld Findings of Fact & Conclusions of Law. (E)
- 3-23-76 Fld Judgmnt After Trial By Court that pltf's have  
Judgmnt against def't USA in amt of \$150,000;  
FUR ORD that in addition to above, pltf  
MAXINE CEARLEY have judgmnt against def't  
USA in amt of \$15,000; FUR ORD that pltf  
KAREN CLEARLEY have judgmnt against def't  
USA in amt of \$17,500; FUR ORD that in addi-  
tion, pltf CHARLES N. CEARLEY have  
Judgmnt against def't USA In amt of \$17,500;. (E)  
JS-6 CARD MADE. (ENT 3-26-76) Cys mld.
- 4-8-76 Fld Bill of Costs calendared for 4-8-76 @ 2 p.m.
- 4-8-76 TAXING BILL OF COSTS—No appearance made  
by JAMES H. MILLER. NOTE: Cost Bill fld  
4-8-76 @ 1 p.m. I notified M. QUINTON who did  
appear & had the following objections: 1)—Ob-  
jects to Crt Reprtr Costs of Transcript obtained  
for cns'l's convenience—not taxable; 2)—Objects  
to depo costs—only costs of original transcript are  
taxable; 3)—Objects to air fare to Dallas, Texas  
for pre-trial—not allowed by statute or local rule;  
& 4)—Objects to late flg by 15 days of Bill of  
Costs. Matter taken under submission. (CLK)  
Cys mld.
- 5-4-76 TAXING OF COSTS—Def't's objection to reprints  
transcript sustained. Transcripts obtained for

cnsl's use are not taxable. Dft's objections to depo costs overruled. Atty for pltf represents costs are for original only. Deft's Objection to air fare for cnsl to attend pre-trial in Dallas is sustained on ground not allowable by statute or local rule. In view of pltf's representation in letter of April 30 re late receipt of the notice of Entry of Judgmt, deft's objection to late flg of Cost Bill is overruled. Costs are Taxed in Sum of \$1,000.36. Cnsl's attention is called to Local Rule 15(g) which provides in part: "not to re-tax by any part, purs to F.R.Cv.P., Rule 54(d), upon written notice thereof, served & fld w/Clk within 5 days after the costs have been taxed in clerk's office..." (CLK) Cys mld.

- 5-11-76 TAXING OF COST—Ent ord that on 5-4-76 costs were taxed herein in sum of \$1,004.36. It now appearing that because of a clerical error, 200 miles mileage allowance for witness RICHARD O'TOOLE, 4422 Chevy Chase Dr., La Canada, California was taxed. Purs to Local Rule 15, mileage is allowed for only that portion of travel within the Dist. Accordingly, the mileage allowance for witness O'TOOLE is hereby reduced to 120 miles of \$12.00 and costs are hereby retaxed in the total sum of \$996.36. (CLK) Cys mld.
- 5-25-76 Fld Notice of Appeal from judgment of 3-26-76.
- 6-3-76 Fld USA notice & motion for extension of time for designation of record on appeal for 6-14-76 @ 10:30 a.m. w/affid of serv.
- 6-8-76 Fld Defts ex parte application for extension of time for designation of record on appeal and affid thereon.  
Fld order extending time to designate record on appeal to 6-30-76(E)
- 6-9-76 Ent ord mot for extension of time off calendar and hearing date vacated. (E)
- 6-30-76 Fld ex parte application and order extending time to file designation of record on appeal to 8-23-76 (E)
- 8-23-76 Fld Appellants designation of record on appeal.

Fld Reporters Transcript of proceedings on appeal Index (D. Joan King OCR) 1 Volume, original and one copy.

Fld Reporters Transcript of proceedings on 1-29-75 (D. Joan King OCR) 1 Volume, original and one copy.

Reporter's Transcript of proceedings on 1-30-75 (D. Joan King OCR) Vol. II, original and one copy.

Reporter's Transcript of proceedings on 1-31-75 (D. Joan King OCR) Vol. III, original and one copy.

Reporter's Transcript of proceedings on 2-4-75 (D. Joan King OCR) Vol. IV, original and one copy.

Reporter's Transcript of proceedings on 2-5-75 (D. Joan King OCR) Vol. V, original and one copy.

Reporter's Transcript of proceedings on 2-5-76 (D. Joan King OCR) Vol. V-a, original and one copy.

Reporter's Transcript of proceedings on 2-6-75, (D. Joan King OCR) Vol. VI, original and one copy.

Reporter's Transcript of proceedings on 3-11-75 (D. Joan King OCR) Vol. VII, original and one copy.

Reporter's Transcript of proceedings on 3-12-75 (D. Joan King OCR) Vol. VIII, original and one copy.

Reporter's Transcript of proceedings on 3-13-75 (D. Joan King OCR) Vol. IX, original and one copy.

Reporter's Transcript of proceedings on 3-14-75 (D. Joan King OCR) Vol. X, original and one copy.

Reporter's Transcript of proceedings on 3-18-75 (D. Joan King OCR) Vol. XI, original and one copy.

Reporter's Transcript of proceedings on 3-19-75 (D. Joan King OCR) Vol. XII, original and one copy.

Reporter's Transcript of proceedings on 3-20-75 (D. Joan King OCR) Vol. XIII, original and one copy.

Reporter's Transcript of proceedings on 3-25-75 (D. Joan King OCR) Vol. XIV, original and one copy.

Reporter's Transcript of proceedings on 3-27-75 (D. Joan King OCR) Vol. XV, original and one copy.

Reporter's Transcript of proceedings on 4-2-75 & 9-8-75 (D. Joan King OCR) Vol. XVI, original and one copy.

SEP 30 1978 Mld rept's trans t/w Clk's record to USCA

2-25-80 Rec'd c.c. of jdgmt from USCA reversing & remanding decision of USDC.

- 3-3-80 Fld notice of hrg request to flg c.c. of jdgmt of USCA reversing jdmt of USDC set 3-24-80 at 10:30am. (Mld cys)
- 3-24-80 Ent ord hrg petn requissite to flg c.c. of jdgmt of USCA reversing & remanding decision of USDC ord fld & entered; fur hrg on remand cont to 4-9-80 at 9am. (E)  
Fld cc. of jdgmt from USCA reversing & remaining decision of USDC. (Ent 3-25-80)
- 4-9-80 Ent ord cont to 6-10-80 at 9:30 am for hrg on remand; briefs to be submitted by 5-19-80 by deft & by 5-9-80 by pltf. (E)
- 5-9-80 Fld pltf trial brief. t/w declar of serv.
- 5-19-80 Fld deft trial brief t/w cert of serv.
- 5-20-80 Flf deft erratum—defts trial brief. t/w cert of serv.
- 5-30-80 Fld pltf rebuttal trial brief t/w declar of serv.
- 6-10-80 Swore wits Ent ord hrg on remand from USCA further hrg cont to 7-9-80 at 9am(E)
- 7-9-80 Ent ord further hrg on remand from USCA hrg cont to 8-7-80 at 9am(E)
- 8-7-80 Ent ord hrg on remand from U.S. ct of Appeals cont to 9-19-80 at 9:30 am(E)
- 9-12-80 Fld pltf request for judicial notice t/w cert of serv.
- 9-19-80 Ent ord hrg deft mot to dis, to strike, testimony of wit Halloday Motion denied, mot to dis submitted, hrg on remand form USCA submitte, pltf's verdict stands, plt to submit prop findings of fact and conc of law w/in 7 days ct to consider memo opin prior to ent of jgmtn (e)
- 9-29-80 Fld pltf memo of p/a in support of request of judicial notice t/w cert of serv.  
Lodged pltf proposed additional finding of facts & conclusions of law t/w cert of serv. (ORIGINAL TO JUDGE E)
- 10-10-80 Lodged pltf's additional findings of fact and conc of law. orig to Judge E
- 10-24-80 Fld deft object to proposed findings of fact & concl of law t/w cert of serv.



- 11-5-80 Fld deft supplemental memo to objections to proposed findings of fact & conclusions of law. t/w cert of serve.
- 11-24-80 Fld findings of fact & conclusions of law, the ct having reaffirmed its decision on 9-19-80 in favor of plts & against the deft U.S.A. (E)(ENT 11-24-80) mld cys  
 Fld memo decision that the jdmt is for the pltf is hereby confirmed & an appropriate form of jdmt shall be prepared by pltfs & submitted to the ct w/in 5 days & also served on defts for approval as to form (E) (ENT 11-24-80) mld cys.
- 12-17-80 Fld confirmation of jdmt, its ord that pltf jdmt aganist deft U.S.A. entered herein on 4-23-76 are confirmed (E) (ENT 12-17-80) mld cys JS6
- 1-22-81 Fld NOTICE OF APPEAL AS TO JDMT Entered on 11-24-80 Mld desig of rept trans & not of docket fee.
- 2-13-81 Fld design of repts trans of 6-10-80 & 9-19-80.
- 2-20-81 Fld appellee trans desig & ord form t/w cert of serv.
- 3-16-81 Fld rept trans of 6-10-80 & 9-19-80 (J. KING OCR) cert of record to USCA & mld cys to atty.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No. 70-138-5

MAXINE CEARLEY, CHARLES NATHAN CEARLEY, a Minor,  
and KAREN MARIE CEARLEY, a Minor, by and through  
their Guardian ad Litem, SANFORD B. HUNT, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

---

COMPLAINT FOR DAMAGES  
FOR WRONGFUL DEATH

---

(Federal Tort Claims Act)

Plaintiffs allege:

I

This action is brought under the provisions of the Act commonly known as the Federal Tort Claims Act and the Court has jurisdiction of the subject matter and of the parties pursuant to the provisions of Title 28, Section 1346(b), 2671, 2674, et seq. of the United States Code and Section 28 USC Section 1402.

II

On or about September 2, 1969, pursuant to Title 28 USC 2675 et seq., a claim was filed with the Federal Aviation Administration Regional Counsel, Los Angeles, California, for the damages in the amount of \$694,000.00. On or about September 15, 1969, plaintiffs' counsel received a request from the Department of Transportation, Federal Aviation Administration, Washington, D.C. for more information. On or about October 30, 1969, additional information was submitted to the Federal Aviation Administration, Washington, D.C. On or about January 14, 1970, plaintiffs received notice from the Federal Aviation Administration Of-

fice of the General Counsel that the above mentioned claim had been rejected.

### III

Plaintiff, MAXINE CEARLEY, is the surviving spouse of CHARLES RAY CEARLEY, and plaintiff, SANFORD B. HUNT, has been appointed Guardian at Litem for plaintiffs, CHARLES NATHAN CEARLEY, age fifteen (15) years, and KAREN MARIE CEARLEY, age sixteen (16) years, on February 25, 1969 in the Superior Court of the State of California, for the County of San Diego, and that said plaintiff, SANFORD B. HUNT, brings this action as the Guardian at Litem of said minor children and for the benefit of said minor children.

### IV

Plaintiffs, and each of them, are residents of San Diego County and the County of San Diego is in the Southern District of California.

### V

On or about October 8, 1968, plaintiffs' decedent, CHARLES RAY CEARLEY, was a passenger for hire on board a regular scheduled flight from Las Vegas, Nevada to San Diego, California, on a DE HAVILLAND DOVE 104 airplane, owned and operated by CATALINA-VEGAS AIRLINES.

### VI

On or about October 8, 1959, the DE HAVILLAND DOVE 104 airplane, referred to above, registration number 4040B, operated by the CATALINA-VEGAS AIRLINES, on said flight from Las Vegas, Nevada to San Diego, California, caught fire in flight and crashed, killing plaintiffs' decedent.

### VII

The aforesaid crash was caused and brought about through the negligence of defendant, its agents, servants and employees acting within the scope of their office or employment in the approval of a standard change order, in-

spection of said aircraft, permitting the aircraft, its engine, parts and appurtenances to be and remain in a defective, dangerous and worn out condition.

### VIII

As a result of the crash of the aircraft, plaintiffs' decedent left surviving him a widow and two (2) children who have forever lost and been deprived of his aid and support, all to the plaintiffs damage in the sum of \$694,000.00.

### IX

The aforementioned death was caused solely by defendant, its agents, servants and employees, and without any negligence of plaintiffs' decedent contributing thereto.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For damages for wrongful death in the sum of \$694,000.00;
  2. For costs of suit incurred herein; and
  3. For such other relief as to this Court may seem just.
- DATED: APRIL 27, 1970.

GELFAND, GEER, POPKO & NICKOLOFF

By: \_\_\_\_\_

MICHAEL I. GREER

*Attorneys for Plaintiffs*

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

} ss.

I am the PLAINTIFF

in the above entitled action; I have read the foregoing COMPLAINT FOR DECEIT FOR  
WRONGFUL DATA (Federal Bank Claims Act)

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify (or declare), under penalty of perjury,\* that the foregoing is true and correct.

Executed on May 6, 1970 at Poway, California  
(date) (place)

Maxine Cearley /s/  
Signature

MAXINE CEARLEY

(PROOF OF SERVICE BY MAIL -- 1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA  
COUNTY OF

} ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

On \_\_\_\_\_, 19\_\_\_\_, I served the within \_\_\_\_\_

on the \_\_\_\_\_  
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the  
United States mail at \_\_\_\_\_  
addressed as follows:

I certify (or declare), under penalty of perjury,\* that the foregoing is true and correct.

Executed on \_\_\_\_\_ at \_\_\_\_\_, California  
(date) (place)

\_\_\_\_\_  
Signature

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

I am the SANFORD B. HUNT, Guardian ad Litem for CHARLES MICHAEL  
CEARLEY, a minor, and KAREN MARIE CEARLEY, a minor

in the above entitled action; I have read the foregoing COMPLAINT FOR DAMAGES FOR  
WRONGFUL DEATH (Federal Debt Claims Act)

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which  
are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify (or declare), under penalty of perjury,\* that the foregoing is true and correct.

Executed on MAY 6, 1970 at POSDEN California  
(date) (place)

SANFORD B. HUNT /s/  
Signature

SANFORD B. HUNT

(PROOF OF SERVICE BY MAIL -- 1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA  
COUNTY OF

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not  
a party to the within entitled action; my business address is:

On \_\_\_\_\_, 19\_\_\_\_, I served the within \_\_\_\_\_

on the \_\_\_\_\_  
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the  
United States mail at \_\_\_\_\_  
addressed as follows:

I certify (or declare), under penalty of perjury,\* that the foregoing is true and correct.

Executed on \_\_\_\_\_ at \_\_\_\_\_ California  
(date) (place)

\_\_\_\_\_  
Signature

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil ction No. 70-138-S

MAXINE CEARLEY, CHARLES NATHAN CEARLEY, a Minor  
and KAREN MARIE CEARLEY, a Minor, by and through  
their Guardian ad Litem, SANFORD B. HUNT, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

HARRY D. STEWARD  
United States Attorney  
RAYMOND F. ZVETINA  
Assistant United States Attorney  
325 West F. Street  
San Diego, California 92101  
Telephone: 714-923-5690  
Attorneys for Defendant

ANSWER TO COMPLAINT

Defendant, UNITED STATES OF AMERICA, by its attorney, HARRY D. STEWARD, United States Attorney for the Southern District of California, for its answer to the plaintiffs' complaint herein, alleged as follows:

FIRST: The allegations contained in paragraph I of the complaint present questions of law which are respectfully referred to this Court for determination.

SECOND: In response to the allegations contained in paragraph II of the complaint, admits that a claim was filed with the Federal Aviation Administration Regional Counsel on behalf of persons claiming as survivors of heirs of the estate of decedent and that the same was denied, and except as above admittes, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.



**THIRD:** It is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "III", "IV" and "V" of the complaint.

**FOURTH:** In response to the allegations of paragraph "VI" of the complaint, admits that at the approximate time alleged a De Havilland aircraft crashed, and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

**FIFTH:** The allegations contained in paragraphs "VII", "VIII" and "IX" of the complaint are denied.

#### **FIRST DEFENSE**

**SIXTH:** This complaint fails to state a cause of action upon which relief can be granted.

#### **SECOND DEFENSE**

**SEVENTH:** This Court lacks jurisdiction of this complaint pursuant to 28 U.S.C. 2680 (a) and (h).

#### **THIRD DEFENSE**

**EIGHTH:** The travel of plaintiffs' decedent, in the aircraft, more particularly described in the complaint, was made subject to, in connection with, and with the acceptance of the risks and perils of the air through which said aircraft travelled, and acts of God, over all of which this defendant had no control, and by accepting, assuming and undertaking all said risks and dangers, plaintiffs' decedent assumed, accepted and undertook all said risks and dangers, and the death of plaintiffs' decedent arose out of and resulted from said risks and dangers and acts of God.

#### **FOURTH DEFENSE**

**NINTH:** Defendant, United States of America, and its agencies and employees, exercised due care and diligence in all of the matters alleged in the complaint herein, and no act or failure to act of defendant, or any agency or employee of defendant, was the proximate cause of any loss or damage to Plaintiffs.

**WHEREFORE,** defendant, UNITED STATES OF AMERICA, demands judgment dismissing the complaint

herein, together with its costs and disbursements and for such other further and different relief as to this court may seem just and proper.

DATED: 9-14-70.

HARRY D. STEWARD  
*United States Attorney*

By: \_\_\_\_\_  
RAYMOND F. ZVETINA  
*Assistant United States Attorney*

OF COUNSEL:

JOHN R. HARRISON  
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Complaint was mailed this 9th day of September, 1970, to:

GALFORD, GREER, POPKO  
& NICKOLOFF  
*Attorneys for Plaintiffs*  
1568 Sixth Avenue  
San Diego, California 92101

/s/ GERARDA A. SMITH  
\_\_\_\_\_  
GERARDA A. SMITH  
*Secretary*  
*Aviation Litigation Unit*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No. 71-37-GT

KATHLEEN M. FLEMING, LAURA A. FLEMING, MICHELLE  
P. FLEMING, THOMAS G. FLEMING, III., AND KEVIN M.  
FLEMING, minors, by and through their Guardian Ad Litem,  
THOMAS G. FLEMING, JR., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH

---

(Federal Tort Claims Act)

Plaintiffs allege:

I

This action is brought under the provisions of the Act commonly known as the Federal Tort Claims Act and the Court has jurisdiction of the subject matter and of the parties pursuant to the provisions of Title 28, Section 1346(b), 2671, 2674, et seq. of the United States code and Section 28 USC Section 1402.

II

On or about October 7, 1970, pursuant to Title 28 USC 2675 et seq., a claim was filed with the Federal Aviation Administration Regional Counsel, Los Angeles, California, for the damages in the amount of \$1,000,000.00. On or about December 1, 1970, plaintiffs received notice from the Federal Aviation Administration Office of the General Counsel that the above mentioned claim had been rejected.

III

THOMAS G. FLEMING, JR. has been appointed Guardian Ad Litem for plaintiffs, KATHLEEN M. FLEMING, age 14; LAURA A. FLEMING, age 11; MICHELLE P.

FLEMING, age 10; THOMAS G. FLEMING, III, age 16 and KEVIN M. FLEMING, age 13, on March 12, 1969, in the Superior Court of the State of California, for the County of San Deigo, and that said THOMAS G. FLEMING, JR. brings that action as the Guardian of said minor children and for the benefit of said minor children.

#### IV

Plaintiffs, and each of them, are residents of San Diego County and the County of San Diego is in the Southern District of California.

#### V

On or about October 8, 1968, plaintiffs' decedent, KATHERINE PATRICIA FLEMING, was a passenger for hire on board a regular scheduled flight from Las Vegas, Nevada to San Diego, California, on a DE HAVILLAND DOVE 104 airplane, owned and operated by CATALINA-VEGAS AIRLINES.

#### VI

On or about October 8, 1968, the DE HAVILLAND DOVE 104 airplane, referred to above, registration number 4040B, operated by the CATALINA-VEGAS AIRLINES, on said flight from Las Vegas, Nevada to San Diego, California, caught fire in flight and crashed, killing plaintiffs' decedent.

#### VII

The aforesaid crash was caused and brought about through the negligence of defendant, its agents, servants and employees acting within the scope of their office or employment in the approval of a standard change order, inspection of said aircraft, permitting the aircraft, its engine, parts and appurtenances to be and remain in a defective, dangerous and worn out condition.

#### VIII

As a result of the crash of the aircraft, plaintiffs' decedent left surviving her five (5) children who have forever

lost and been deprived of her aid and support, all to the plaintiffs' damage in the sum of \$1,000,000.00.

## IX

The aforementioned death was caused solely by the defendant, its agents, servants and employes, and without any negligence of plaintiffs' decedent contributing thereto.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For damages for wrongful death in the sum of \$1,000,000.00
2. For costs of suit incurred herein; and
3. For such other relief as to this Court may seem just.

DATED: JANURY 29, 1971.

RICHARD F. GERRY AND  
CASEY, McCLENAHAN & FRALEY

By: Richard F. Gerry

---

RICHARD F. GERRY  
*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No. 71-37-GT  
Filed: May 3, 1971

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*  
325 West F Street  
San Diego, California 92101  
Telephone: 293-5675  
*Attorneys for Defendant.*

KATHLEEN FLEMING, LAURA A. FLEMING, MICHELLE P.  
FLEMING, THOMAS G. FLEMING, III, AND KEVIN M.  
FLEMING, MINORS, BY AND THROUGH THEIR GUARDIAN AD  
LITEM, THOMAS G. FLEMING, JR., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER TO COMPLAINT

Defendant, UNITED STATES OF AMERICA, by its attorney, HARRY D. STEWARD, United States Attorney for the Southern District of California, for its answer to the complaint herein, answers as follows:

FIRST: The allegations contained in paragraph I of the complaint present questions of law which are respectfully referred to the court for determination.

SECOND: In response to the allegations in paragraph II of the complaint, admits that a claim was filed with the Federal Aviation Administration Regional Counsel on behalf of persons claiming as survivors of heirs of the estate of decedent and that the same was denied, and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

**THIRD:** It is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph "III" "IV" and "V" of the complaint.

**FOURTH:** In response to the allegations of paragraph "VI" of the complaint, admits that at the approximate time alleged in the complaint a De Havilland aircraft crashed, and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

**FIFTH:** The allegations contained in paragraphs "VII", "VIII" and "IX" of the complaint are denied.

#### **FIRST DEFENSE**

**SIXTH:** The complaint fails to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

**SEVENTH:** This Court lacks jurisdiction of this complaint pursuant to 28 U.S.C. 2680(a) and (h).

#### **THIRD DEFENSE**

**EIGHTH:** The travel of plaintiffs' decedent in the aircraft more particularly described in the complaint, was made subject to, in connection with, and with the acceptance of the risks and perils of the air through which said aircraft travelled, and acts of God over all of which this defendant had no control, and by accepting assuming and undertaking all said risks and dangers, plaintiffs' decedent assumed, accepted and undertook all said risks and dangers and the death of plaintiffs' decedent arose out of and resulted from said risks and dangers and acts of God.

#### **FOURTH DEFENSE**

**NINTH:** Defendant, United States of America, and its agencies and employees, exercised due care and diligence in all of the matter alleged in the complaint, and no act or failure to act of defendant or any of its agents or employees was the proximate cause of any loss or damage to plaintiffs.

**WHEREFORE,** Defendant, UNITED STATES OF AMERICA, demands judgment dismissing the complaint herein, together with its costs and disbursements, and for



such other further and different relief as to this court may seem just and proper.

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*

/s/ \_\_\_\_\_  
JOHN R. HARRISON  
*Department of Justice*  
*Washington, D.C. 20530*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Complaint was mailed this 29th day of April, 1971, to:

RICHARD F. GERRY, Esq.  
AND  
CASEY, McCLENAHAN & FRALEY  
*110 Laurel Street*  
*San Diego, California 92101*

/s/ \_\_\_\_\_  
GERARDA A. SMITH

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No: 71-38-CW

SIMONNE C. WEAVER; SONJA S. WEAVER, GARY R.  
WEAVER, AND MONIQUE LAHOMA WEAVER, A.K.A.,  
MONIQUE LOHMA WEAVER, MINORS, BY AND THROUGH  
THEIR GUARDIAN AD LITEM, SIMONNE C. WEAVER,  
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

COMPLAINT FOR DAMAGES  
FOR WRONGFUL DEATH  
(Federal Tort Claims Act)

Plaintiffs allege:

I

This action is brought under the provisions of the Act commonly known as the Federal Tort Claims Act and the Court has jurisdiction of the subject matter and of the parties pursuant to the provisions of Title 28, Section 1346(b), 2671, 2674, et seq. of the United States Code and Section 28 USC Section 1402.

II

On or about October 7, 1970, pursuant to Title 28 USC 2675 et seq., a claim was filed with the Federal Aviation Administration Regional Counsel, Los Angeles, California, for the damages in the amount of \$2,000,000.00. On or about December 1, 1970, plaintiffs received notice from the Federal Aviation Administration Office of the General Counsel that the above mentioned claim had been rejected.

III

Plaintiff, SIMONNE C. WEAVER, is the surviving spouse of VERNON CLYDE WEAVER, and has been appointed Guardian Ad Litem for plaintiffs, SONJA S. WEAVER, age 12; GARY R. WEAVER, age 11 and MONIQUE LAHOMA WEAVER, aka MONIQUE

LOHMA WEAVER, age 7 on October 5, 1970, in the Superior Court of the State of California, for the County of San Diego, and that said plaintiff SIMONNE C. WEAVER brings this action as the Guardian of said minor children and for the benefit of said minor children.

#### IV

Plaintiffs, and each of them, are residents of San Diego County and the County of San Diego is in the Southern District of California.

#### V

On or about October 8, 1968, plaintiffs' decedent, VERNON CLYDE WEAVER was the co-pilot on a regular scheduled flight from Las Vegas, Nevada to San Diego, California, on a DE HAVILLAND DOVE 104 airplane, owned and operated by CATALINA-VEGAS AIRLINES.

#### VI

On or about October 8, 1968, the DE HAVILLAND DOVE 104 airplane, referred to above, registration number 4040B, operated by the CATALINA-VEGAS AIRLINES, on said flight from Las Vegas, Nevada to San Diego, California, caught fire in flight and crashed, killing plaintiffs' decedent.

#### VII

The aforesaid crash was caused and brought about through the negligence of defendant, its agents, servants and employees acting within the scope of their office or employment in the approval of a standard change order, inspection of said aircraft, permitting the aircraft, its engine, parts and appurtenances to be and remain in a defective, dangerous and worn out condition.

#### VIII

As a result of the crash of the aircraft, plaintiffs' decedent left surviving him a widow and three (3) children who have forever lost and been deprived of his aid and support, all to the plaintiffs' damage in the sum of \$2,000,000.00.

## IX

The aforementioned death was caused solely by the defendant, its agents, servants and employees, and without any negligence of plaintiffs' decedent contributing thereto.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For damages for wrongful death in the sum of \$2,000,000.00;
2. For costs of suit incurred herein; and
3. For such other relief as to this Court may seem just.

DATED: Jan. 29, 1971.

RICHARD F. GERRY AND  
CASEY, MCCLENAHAN & FRALEY

/s/

---

RICHARD F. GERRY  
*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 71-38-CW

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*  
325 West F Street  
San Deigo, California 92101  
Telephone: 293-5675

*Attorneys for Defendant.*

SIMONNE C. WEAVER; SONJA S. WEAVER, GARY R. WEAVER AND  
MONIQUE LAHOMA WEAVER, AKA, MONIQUE LOHMA WEAVER,  
MINORS, BY AND THROUGH THEIR GUARDIAN AD LITEM, SIMONNE  
C. WEAVER, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

**ANSWER TO COMPLAINT**

Defendant, UNITED STATES OF AMERICA, by its attorney, HARRY D. STEWARD, United States Attorney for the Southern District of California, for its answer to the complaint herein, answers as follows:

FIRST: The allegations contained in paragraph I of the complaint present questions of law which are respectfully referred to the court for determination.

SECOND: In response to the allegations in paragraph II of the complaint, admits that a claim was filed with the Federal Aviation Administration Regional Counsel on behalf of persons claiming as survivors or heirs of the estate of decedent and that the same was denied, and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

THIRD: It is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "III" and "IV" of the complaint.

FOURTH: In response to the allegations of paragraphs "V" and "VI" of the complaint, admits that at the approxi-

mate time a De Havilland aircraft crashed, and except as above admitted, it is without knowledge or information sufficient to form a belief as to each and every other allegation contained therein.

FIFTH: The allegations contained in paragraphs "VII", "VIII" and "IX" of the complaint are denied.

#### FIRST DEFENSE

SIXTH: The complaint fails to state a claim upon which relief can be granted.

#### SECOND DEFENSE

SEVENTH: This Court lacks jurisdiction of this complaint pursuant to 28 U.S.C. 2680(a) and (h).

#### THIRD DEFENSE

EIGHTH: The travel of plaintiffs' decedent in the aircraft, more particularly described in the complaint, was made subject to, in connection with, and with the acceptance of the risks and perils the air through which said aircraft travelled, and acts of God, over all of which this defendant had no control, and by accepting, assuming and undertaking all said risks and dangers, plaintiffs' decedent assumed, accepted and undertook all said risks and dangers, and the death of plaintiffs' decedent arose out of and resulted from said risks and dangers and acts of God.

#### FOURTH DEFENSE

NINTH: Defendant, United States of America, and its agencies and employees, exercised due care and diligence in all of the matter alleged in the complaint, and no act or failure to act of defendant any of its agents, servants or employees was the proximate cause of any loss or damage to plaintiffs.

#### FIFTH DEFENSE

TENTH: The negligence of plaintiffs' decedent caused or contributed to the accident herein alleged.

WHEREFORE, Defendant, UNITED STATES OF AMERICA, demands judgment dismissing the complaint herein, together with its costs and disbursements, and for

such other, further and different relief as to this court may seem just and proper.

HARRY D. STEWARD  
*United States Attorney*

/s/ \_\_\_\_\_  
JOHN R. HARRISON  
*Department of Justice*  
*Washington, D.C. 20530*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Complaint was mailed this 29th day of April, 1971, to:

RICHARD F. GERRY, Esq.  
AND  
CASEY. McCLENAHAN & FRALEY  
*110 Laurel Street*  
*San Diego, California 92101*

/s/ \_\_\_\_\_  
GERARDA A. SMITH



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No: 71-39-S

JOHN WM. DOWDLE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT FOR  
PROPERTY DAMAGE

Plaintiff alleges:

I

This action is brought under the provisions of the Act commonly known as the Federal Tort Claims Act and the Court has jurisdiction of the subject matter and of the parties pursuant to the provisions of Title 28, Section 1346(b), 2671, 2674, et seq. of the United States Code and Section 28 USC Section 1402.

II

On or about October 7, 1970, pursuant to Title 28 USC 2675 et seq., a claim was filed with the Federal Aviation Administration Regional Counsel, Los Angeles, California, for the property damage in the amount of \$80,000.00. On or about December 1, 1970, plaintiff received notice from the Federal Aviation Administration Office of the General Counsel that the above mentioned claim had been rejected.

III

JOHN WM. DOWDLE, JR. was the owner and registered title holder of that certain aircraft known as DE HAVILLAND DOVE 104, U.S. registration number N 4040 B, serial number 04328.

IV

Plaintiff is a resident of San Diego County and the County of San Diego is in the Southern District of California.

## V

On or about October 8, 1968, that certain aircraft was on a regular scheduled flight from Las Vegas, Nevada to San Diego, California.

## VI

On or about October 8, 1968, the DE HAVILLAND DOVE 104 airplane, referred to above, registration number 4040 B, operated by JOHN WM. DOWDLE, JR., d/b/a CATALINA-VEGAS AIRLINES, on said flight from Las Vegas, Nevada to San Diego, California, caught fire in flight and crashed, resulting in the total destruction of said airplane.

## VII

The aforesaid crash was caused and brought about through the negligence of defendant, its agents, servants and employees acting within the scope of their office or employment in the approval of a standard change order, inspection of said aircraft, permitting the aircraft, its engine, parts and appurtenances to be and remain in a defective, dangerous and worn out condition.

## VIII

As a result of the crash of the aircraft, plaintiff JOHN WM. DOWDLE, JR. suffered loss of use and revenue from said aircraft all to his damage in the sum of \$30,000.00.

## IX

Reasonable value of said aircraft at the time of the crash was \$50,000.00 and as a result of said crash the aircraft was totally destroyed all to plaintiff's damage in the sum of \$50,000.00.

## X

The aforementioned crash was caused solely by the defendant, its agents, servants and employees, and without any negligence of plaintiff contributing thereto.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. For property damage in the amount of \$50,000.00;

2. For loss of use and revenue in the amount of \$30,000.00;

3. For all costs of suit; and

4. For such other and further relief as to the Court seems just and proper.

DATED Jan. 29th, 1971.

RICHARD F. GERRY, AND  
CASEY, McCLENAHAN & FRALEY

/s/

---

RICHARD F. GERRY  
*Attorneys for plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 71-39-S

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*  
*325 West F Street*  
*San Diego, California 92101*  
*Telephone: 293-5675*  
*Attorneys for Defendant*

JOHN WM. DOWDLE, JR., PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S ANSWER TO  
COMPLAINT AND COUNTERCLAIM

Defendant, UNITED STATES OF AMERICA, by HARRY D. STEWARD, United States Attorney for the Southern District of California, for its answer to the complaint herein, answers as follows:

FIRST: The allegations contained in paragraph I of the complaint present questions of law which are respectfully referred to the court for determination.

SECOND: In response to the allegations contained in paragraph "II" of the complaint, admits that a claim was filed with the Federal Aviation Administration Regional Counsel and that the same was denied and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

THIRD: It is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph "V" of the complaint.

FOURTH: In response to the allegations of Paragraph "VI" of the complaint, admits that at the approximate time alleged a De Havilland aircraft crashed, and except as above admitted, it is without information or knowledge suffi-

cient to form a belief as to each and every other allegation contained therein.

**FIFTH:** The allegations contained in paragraphs "III" and "IV" of the complaint are admitted.

**SIXTH:** Denies each and every allegation contained in paragraph "VII", "VIII", "IX" and "X" of the complaint.

#### **FIRST DEFENSE**

**SEVENTH:** The complaint fails to state a cause of action upon which relief can be granted.

#### **SECOND DEFENSE**

**EIGHTH:** This Court lacks jurisdiction of this complaint pursuant to 28 U.S.C. 2680(a) and (h).

#### **THIRD DEFENSE**

**NINTH:** The travel of plaintiff in the aircraft more particularly described in the complaint was made subject to and in connection with the risks and perils of the air through which said aircraft travelled, and acts of God, over all of which this defendant had no control, and by accepting, assuming and undertaking all said risks and dangers, plaintiff assumed, accepted and undertook all said risks and dangers, and the damages alleged in the complaint arose out of and resulted from said risks and dangers and acts of God.

#### **FOURTH DEFENSE**

**TENTH:** Defendant, United States of America, and its agencies and employees exercised due care and diligence in all of the matters alleged in the complaint, and no act or failure to act of defendant or any of its employees or agencies was the proximate cause of any loss or damage to plaintiff.

#### **FIFTH DEFENSE**

**ELEVENTH:** The negligence of plaintiff, his officers, agents, employees and/or representatives caused or contributed to the accident herein alleged.

#### **COUNTERCLAIM**

1. On or about May, 11, 1970, an action was commenced in the United States District Court for the Southern Dis-

trict of California entitled *Maxine Cearley, et al. v. United States* bearing Civil No. 70-138-S, and on or about May 19, 1970, copies of the summons and complaint were served on defendant United States of America.

2. On or about February 1, 1971 an action was commenced in the United States District Court for the Southern District of California entitled *Kathleen M. Fleming, et al. v. United States*, bearing Civil No. 71-37-GT, and on or about February 3, 1971, copies of the summons and complaint were served on defendant United States of America.

3. On or about February 1, 1971 an action was commenced in the United states District Court for the Southern District of California entitled *Simonne Weaver, et al. v. United States*, bearing Civil No. 71-38-CW, and on or about February 3, 1971, copies of the summons and complaint were served on defendant United States of America.

4. Attached hereto and made a part hereof is a copy of each of the foregoing complaints filed therein against defendant United States of America.

5. It is alleged in said complaints that decedents Cearley and Fleming were passengers for hire on board a commercial aircraft of plaintiff John Wm. Dowdle, and that decedent Weaver was the co-pilot of said aircraft, a De Havilland Dove 104, N4040B, on a regular scheduled flight from Las Vegas, Nevada to San Diego, California; that said aircraft caught fire and crashed, killing the above decedents; that the crash was caused by the negligence of the United States of America, and that the plaintiffs were damaged thereby in the sums set forth in the attached complaints.

6. The aircraft involved in the aforesaid crash was operated, used, dispatched, maintained, equipped, flown and controlled by plaintiff.

7. Plaintiff is and was a common carrier of passengers for hire in air commerce and/or in air transportation.

8. Defendant United States of America denies that any negligent or wrongful act or omission of any agent, servant or employee of the United States of America, while acting in the scope of his employment, caused or contributed to the said crash or the damages allegedly sustained by plain-

tiff in this action or plaintiffs set forth in paragraphs 1, 2 and 3 above.

9. If any negligent or wrongful act or omission of any agent, servant or employee of the United States of America, while acting within the scope of his employment, is found to have occurred in connection with the circumstances of said crash, it was not the proximate or foreseeable cause thereof.

10. Said crash and the alleged consequent damage to plaintiffs set forth in paragraphs 1, 2 and 3 above was caused by the careless, reckless, negligent and wrongful acts or omissions of the plaintiff in the above-entitled cause, or his officers, agents, servants or other representatives in the operation, use, dispatch, maintenance, equipping, flying and controlling of said aircraft involved in the accident herein.

11. If any negligent or wrongful act or omission of any agent, servant or employee of the United States of America, while acting in the scope of his employment, is found to have occurred in connection with the circumstances of said crash, and is found to have caused or contributed thereto, such act or omission was, in relation to the careless, negligent or wrongful act or omissions of plaintiff in the above cause, a passive, secondary or otherwise derivative act or omission.

12. In the circumstances of the said crash, the United States of America did not owe any legal duty to plaintiffs breach of which was the proximate cause of any loss or damage to plaintiffs set forth in paragraphs 1, 2 and 3 above, but if any such duty is found, the duty of plaintiff herein, or his officers, agents, servants and other representatives was, in relation to that of the United States of America, the primary duty, and plaintiff herein is primarily liable for any loss or damage sustained by the United States of America on account of the matters alleged in the complaint attached hereto.

13. If, as a result of the matters alleged in the complaints attached hereto the United States is held liable for all or any part of the claims of plaintiffs therein, plaintiff herein would be liable to the United States of America for a pro



rata share of any liability so assessed by way of contribution, and accordingly, the United States of America asserts its right to such contribution.

WHEREFORE, defendant, UNITED STATES OF AMERICA, demands:

1. Dismissal of the complaint;
2. Judgment against plaintiff for all sums that may be adjudged against the United States of America in favor of the plaintiffs in the complaints attached hereto.
3. In the alternative, for such pro rata part thereof, by way of contribution, as may be just and proper in accordance with applicable laws;
4. Its costs, disbursements, the reasonable value of its attorneys' fees, and such other, further and different relief as to this court may seem just and proper.

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*

/s/ \_\_\_\_\_  
JOHN R. HARRISON  
*Department of Justice*  
*Washington, D.C. 20530*

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Complaint and Counterclaim was mailed this 29th day of April, 1971, to:

RICHARD F. GERRY, ESQ,  
*and*  
CASEY, McCLENAHAN & FRALEY  
*110 Laurel Street*  
*San Diego, California 92101*

/s/ \_\_\_\_\_

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

No: 71-36-T

UNITED SCOTTISH INS. CO., LTD.; BRITISH NATIONAL LIFE  
INS. SOC., LTD.; EDINBURGH ASSURANCE CO., LTD.;  
MINISTER INS. CO., LTD.; PHOENIX ASSURANCE CO., LTD.;  
HOME AND OVERSEAS INS. CO., LTD.; SCOTTISH LION INS.  
CO., LTD.; WURTTENBURGISCHE FEURER, A.G.; ST.  
HELEN'S INS. CO., LTD.; AND NEW ROTTERDAM INS. CO.,  
LTD., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

COMPLAINT FOR INDEMNITY DAMAGE

(Federal Tort Claims Act)

Plaintiffs allege:

I

This action is brought under the provisions of the Act commonly known as the Federal Tort Claims Act and the Court has jurisdiction of the subject matter and of the parties pursuant to the provisions of Title 28, Section 1346(b), 2671, 2674, et seq. of the United States Code and Section 28 USC Section 1402.

II

On or about October 7, 1970, pursuant to Title 28 USC 2675 et seq., a claim was filed with the Federal Aviation Administration Regional Counsel, Los Angeles, California, for the damages in the amount of \$110,000.00. On or about December 1, 1970, plaintiffs received notice from the Federal Aviation Administration Office of the General Counsel that the above mentioned claim had been rejected.

III

Plaintiffs above named are licensed to and do engage in the business of insuring aircraft and aircraft owners against public liability and other risks.

## IV

On or about October 8, 1968, JOHN WM. DOWDLE, JR., doing business under the fictitious name of CATALINA VEGAS AIRLINES, was the owner and registered title holder of a certain DE HAVILLAND DOVE 104, registration number N 4040 B, serial number 04328.

## V

Prior to October 8, 1968, plaintiffs caused to be issue and did issue a policy of public liability insurance insuring JOHN WN. DOWDLE, JR. and CATALINA VEGAS AIRLINES against loss caused by injury or death to passengers being carrier upon said DE HAVILLAND DOVE aircraft.

## VI

Said policy of insurance was in full force and effect on October 8, 1968.

## VII

On October 8, 1968, said aircraft, while flying in the vicinity of Las Vegas, Nevada, was caused to crash and burst into flames and crash into the ground.

## VIII

At the time of said crash KATHERINE PATRICIA FLEMING and CHARLES RAY CEARLEY were being carried in said aircraft as paying passengers. As a proximate result of said crash passengers KATHERINE PATRICIA FLEMING and CHARLES RAY CEARLEY were killed.

## IX

At the time subsequent to the airplane crash the heirs of KATHERINE PATRICIA FLEMING and CHARLES RAY CEARLEY was caused to be filed and did file in the Superior Court in the State of California in and for the County of San Diego complaints charging various defendants, including JOHN WM. DOWDLE, JR., d/b/a CATALINA VEGAS AIRLINES with negligence in the ownership, operation, maintenance and repair of said aircraft.

## X

Although at all times maintaining the lack of negligence on the part of the assured, JOHN WM. DOWDLE, JR., d/b/a CATALINA VEGAS AIRLINES and further maintaining that if any negligence there was that said negligence was passive and not active, plaintiffs in the usual and normal course of business and in the exercise of good business judgment and because of the strict laws pertaining to the conduct of common carriers did enter into compromises and releases with the said heirs of KATHERINE PATRICIA FLEMING and CHARLES RAY CEARLEY as payment to the heirs of each of them of \$50,000.00 in exchange of Covenant Not to Sue or Sue Further, all to the damage of plaintiffs in the sum of \$100,000.00. Said compromises, releases and settlements were duly approved by the Superior Court in the State of California and for the County of San Diego.

## XI

As a result of the filing of said law suits plaintiffs were required to and did incur expenses for attorneys fees, costs and other expenses in the approximate sum of \$10,000.00.

## XII

The aforesaid crash was caused and brought about through the negligence of defendant, its agents, servants and employees acting within the scope of their office or employment in the approval of a standard change order, inspection of said aircraft, permitting the aircraft, its engine, parts and appurtenances to be and remain in a defective, dangerous and worn out condition.

## XIII

The aforementioned crash was caused solely by defendant, its agents, servants and employees, and without any negligence of plaintiffs contributing thereto.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For indemnification by costs of defendant, to include all costs, loss, judgment, expenses, to include attorneys

fees, and all other expenses and expenditures whatsoever related to the matter herein alleged, including \$100,000.00 for settlements previously incurred and \$10,000.00 for costs and attorneys fees previously incurred.

2. That these plaintiffs be held harmless in all respects and reimbursed in full;

3. For costs of suit;

4. For such other and further relief as to the Court seems just and proper.

DATE: Jan. 29, 1971.

RICHARD F. GERRY, AND  
CASEY, MCCLENAHAN & FRALEY

/s/

\_\_\_\_\_  
RICHARD F. GERRY  
*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 71-36-T

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant United States Attorney*  
325 West F Street  
San Diego, California  
Telephone: 2933-5675  
*Attorneys for Defendant*

UNITED SCOTISH INSURANCE COMPANY, LTD., ET AL.,  
PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

**ANSWER TO COMPLAINT**

Defendant, UNITED STATES OF AMERICA, by its attorney, HARRY D. STEWARD, United States Attorney for the District of Southern California, for its answer to the complaint herein, answers as follows:

FIRST: The allegations contained in paragraph I of the complaint are respectfully referred to the court for determination.

SECOND: In response to the allegations in paragraph II of the complaint, admits that a claim was filed with the Federal Aviation Administration Regional Counsel and that the same was denied and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation therein.

THIRD: It is without knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "III", "V", "VI", "X" and "XI" of the complaint.

FOURTH: The allegations contained in paragraph IV of the complaint are admitted.

**FIFTH:** In response to the allegations contained in paragraphs "VII" and "VIII", admits the aircraft crashed on the date and at the place alleged, that the alleged passengers were aboard, and were killed, and except as above admitted, it is without information or knowledge sufficient to form a belief as to each and every other allegation contained therein.

**SIXTH:** The allegations contained in paragraphs "XII" and "XIII" are denied.

#### **FIRST DEFENSE**

**SEVENTH:** The complaint fails to state a cause of action upon which relief can be granted.

#### **SECOND DEFENSE**

**EIGHTH:** This Court lacks jurisdiction of this claim pursuant to 28 U.S.C. 2680(a) and (h).

#### **THIRD DEFENSE**

**NINTH:** The travel of decedents in the aircraft, more particularly described in the complaint, was made subject to, in connection with, and with the acceptance of the risks and perils of the air through which said aircraft travelled and acts of God, over all of which this defendant had no control, and by accepting, assuming and undertaking all said risks and dangers, decedents assumed, accepted and undertook all said risks and dangers, and the death of decedents arose out of and resulted from said risks and dangers and acts of God.

#### **FOURTH DEFENSE**

**TENTH:** Defendant, United States of America, and its agencies and employees, exercise due care and diligence in all of the matters alleged in the complaint, and no act or failure to act of defendant or any of its agents or employees was the proximate cause of any loss or damage to plaintiffs.

#### **FIFTH DEFENSE**

**ELEVENTH:** Plaintiffs' insured, his officers, agents, employees, and/or other representatives caused or contributed to the accident herein alleged.



WHEREFORE, Defendant, UNITED STATES OF AMERICA, demands judgment dismissing the complaint herein, together with its costs and disbursements and for such other further and different relief as to this court may seem just and proper.

HARRY D. STEWARD  
*United States Attorney*

SHELDON DEUTSCH  
*Assistant U.S. Attorney*

/s/ \_\_\_\_\_  
JOHN R. HARRISON  
*Department of Justice*  
*Washington, D.C. 20530*

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer to Complaint was mailed this 29th day of April, 1971 to:

RICHARD F. GERRY, Esq.

AND

CASEY, MCCLENAHAN & FRALEY  
*110 Laurel Street*  
*San Diego, California 92101*

/s/ \_\_\_\_\_  
GERARDA A. SMITH

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GREER, POPKO, MILLER & FOERSTER  
*A Professional Corporation*  
1568 6th Avenue  
San Diego, California—92191  
Telephone 239-0461

RICHARD F. GERRY  
*Attorney at Law*  
110 Laurel Street  
San Diego, California—92191  
Telephone 239-0461  
*Attorneys for Plaintiffs*

Civil No. 70-138-E

MAXINE CEARLEY ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANTS.

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Civil No. 71-36-E

SCOTTISH INSURANCE COMPANY ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

---

Civil No. 71-37-E

KATHRYN FLEMING ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

Civil No. 71-38-E

SIMONE WEAVER ET AL., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

---

Civil No. 71-39-E

JOHN WILLIAM DOWDLE, JR., PLAINTIFF,

*v.*

UNITED STATES OF AMERICA, DEFENDANT

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### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial on January 29, 1975, in the above entitled court, the Honorable WILLIAM B. ENRIGHT, Judge Presiding, without a jury, and was actually tried on said date and subsequent dates.

GREER, POPKO, MILLER & FOERSTER, by JAMES H. MILLER, appeared as counsel for plaintiffs MAXINE CEARLEY et al., and RICHARD F. GERRY appeared as counsel for plaintiffs KATHRYN FLEMING et al. JOSEPH T. COOK of the Department of Justice, and MICHAEL QUINTON, Assistant United States Attorney, appeared as counsel for the defendant UNITED STATES OF AMERICA.

Said cause having been heard, evidence both oral and documentary having been introduced, and said cause having been submitted for a decision, the Court, having rendered its decision and Memorandum of Decision on April 2, 1975, in favor of the plaintiffs and against defendant UNITED STATES OF AMERICA, now makes the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. The air crash at issue in this case is the crash of DeHavilland-Dove Registration Number N4040B, on October 8, 1968, approximately 3-½ miles south of McCarron Field, Las Vegas, Nevada.

2. Aircraft N4040B was constructed in the United Kingdom on December 18, 1951, and was entered into the United States.

3. In the year 1965, N4040B and another DeHavilland-Dove aircraft, Registration Number N4041B, were owned and operated by AIR WISCONSIN.

4. In the summer of 1965 AIR WISCONSIN requested AERODYNE ENGINEERING CORPORATION, A Texas Corporation, to install a combustion heater in Aircraft N4040B, and at that time, or on a subsequent date, requested that the same installation be made in N4041B.

5. AERODYNE ENGINEERING CORPORATION submitted an application to the Federal Aviation Agency for a Supplemental Type Certificate (S.T.C.) which would au-

thorize the installation of a combustion heater in aircraft N4040B. Subsequently, AERODYNE ENGINEERING CORPORATION requested a revision of said Supplemental Type Certificate, to allow an identical installation on Aircraft N4041B.

6. Said Supplemental Type Certificate was approved by the Federal Aviation Administration as S.T.C. #SA541SW, and the revision was approved as S.T.C. #SA541SW, Revision 1.

7. Federal Aviation Administration regulations in effect in 1965 required that a Federal Aviation Administration Inspector, or a designated General Aviation District Office Inspector physically inspect the combustion heater installations prior to the approval of the S.T.C. or its Revision 1 before the S.T.C. or its Revision 1 could be approved.

8. AERODYNE ENGINEERING CORPORATION installed Southwind Combustion Heaters 8240A in the forward baggage compartments of said Aircraft N4040B and N4041B.

9. Said installations were done pursuant to S.T.C. SA541SW and Revision 1.

10. Said installations are substantially identical.

11. The combustion heater installations were made by utilizing an existing copper fuel line mounted in the belly of the aircraft that had been part of a hand engine priming system which had previously been replaced with a different priming system.

12. Said copper fuel lines were cut at a point just forward of the sloping bulkhead which separated the passenger compartment from the cockpit and forward luggage compartment (located directly below the cockpit).

13. A stainless steel fuel line was coupled to the copper line with a stainless steel junction block. This stainless steel line was run from the connection at the center belly of the aircraft, up to the left, along the forward side of the sloping bulkhead to the upper left corner of the rear wall of the forward baggage compartment. There is was clamped and run forward along the ceiling of the forward baggage compartment to a valve attached to said ceiling. Said valve was controlled by a handle located on the floor of the cock-

pit, to the left of the pilot's seat, between the pilot's seat and the left wall of the cockpit. The handle was metallic and not painted red.

14. From the valve, a stainless steel fuel line was run forward to the combustion heater located in the nose compartment of the aircraft.

15. The stainless steel lines were unsupported by any clamps for the run of approximately 3-½ feet from the junction with the copper fuel line to the clamp at the upper left corner of the rear wall of the forward baggage compartment. There was a grommet around the line where it passed through a stiffening rib of the sloping bulkhead. Grommets are not proper supports for fuel lines, and can lead to concealed damage to fuel lines when the rubber center is worn through and the line rubs on the other metal surface at a point concealed by the outer body of the grommet.

16. The junction block that connected the copper line to the stainless steel line was tied down by a plastic tie, commonly used to bundle and tie down electrical wires in aircraft. This tie-down is not adequate to clamp a fuel line in an aircraft.

17. The above described stainless steel fuel line was installed so that it passed in close proximity to a stainless steel bolt and nut. The separation distance on N4041B was approximately 1/16 inch. The point on the line was a place where the line could interact with the bolt and nut, and cause a rupture in the line.

18. The existing copper line which was used in the heater installation was not annealed when it was connected to the stainless steel line by the fuel junction block. Copper tubing is subject to work hardening when it is shaped and/or subjected to flexion against harder metals, such as stainless steel. If the copper tubing is not annealed, stress concentrations created when it is formed create points where subsequent vibration can lead to fracture and catastrophic failure.

19. The stainless steel lines as installed in N4040B and N4041B were free to vibrate with a fore and aft motion of approximately 3 inches from center in each direction, and

an additional horizontal motion along the face of the sloping bulkhead. This vibrational excursion was greatly in excess of that called for in Federal Aviation Agency regulations, and could have been eliminated by the proper use of clamps.

20. The force inputs into the Dove aircraft, caused by engine vibration, air turbulence, and landing impact shocks, were within the range of vibrations to which the above-described heater installation was susceptible because of the lack of supporting clamps on the fuel lines.

21. The heater installation as installed exhibited numerous design deficiencies that were not proximately related to the in-flight fire and crash at issue herein, but which should have alerted any reasonably competent F.A.A. or G.A.D.O. inspector to the fact that the over-all quality of the design and fabrication on this S.T.C. was not consistent with F.A.A. regulations.

22. The heater installation was unairworthy in that:

A. The stainless steel fuel line was not properly clamped along the approximately 3-½ foot run up the forward wall of the sloping bulkhead, and was free to vibrate to a degree greatly in excess of that vibration that would be allowable under F.A.A. regulations and good design practice. Such vibration could allow chafing of the line on structural members, and also lead to failure due to metal fatigue. Either of these failure modes could result in the release of gasoline.

B. The existing copper tubing was not annealed after being cut, bent upward, and flared to connect it to the stainless steel junction block. The copper line was connected at approximately a right angle to the most severe vibrational excursion of the stainless steel line, so that the flared portion of the copper would be subjected to vibrational work hardening that could lead to the copper becoming brittle and fracturing, causing fuel line failure.

23. The fire began in the area long or immediately below the the forward surface of the sloping bulkhead, while the aircraft was in flight. All of the fire damage patterns discovered on those portions of the wreckage which were not in the ground fire area are consistent with the fire commencing at this location. Said fire damage patterns are

inconsistent with any alternative starting point for the fire, such as the wing.

24. The fuel for the fire was initially gasoline.

25. The source of the gasoline was the heater fuel line located along or just below the forward wall of the sloping bulkhead.

26. The gasoline escaped from the heater fuel line because of a failure of that line along, or just below, the forward wall of the sloping bulkhead, due to metal fatigue or chafing caused by excessive vibrations of the fuel line.

27. If the F.A.A. had properly inspected the heater installation on N4040B in accordance with F.A.A. regulations, AERODYNE ENGINEERING would have been required to either remove that installation because it was unairworthy, or to modify the installation to correct the excessive vibration of the fuel line, use of dissimilar metals, and other defects, so as to make the installation airworthy. In either case, the accident at issue herein would not have occurred if a nonnegligent, proper inspection had been made.

28. The F.A.A. personnel or their designees who inspected the heater installation on N4040B were negligent in making the inspection of N4040B.

29. Said negligence was the proximate cause of the inflight fire and crash at issue herein.

30. The type of annual and 100-hour inspections performed by plaintiff DOWDLE and his agents were not intended to check on the airworthiness of installations made under S.T.C.'s authorized by the F.A.A. and inspected and approved by the F.A.A.

31. JACK DOWDLE, doing business as Catalina Vegas Airlines, his agents, servants and employees, did not contribute negligently or otherwise in causing the aircrash which is the subject matter of this action.

32. The plaintiffs UNITED SCOTTISH INSURANCE COMPANY, LTD., BRITISH NATIONAL LIFE INSURANCE SOCIETY, LTD., MINISTER INSURANCE COMPANY, LTD., PHOENIX INSURANCE COMPANY, LTD., HOME AND OVERSEAS INSURANCE COMPANY, LTD., SCOTTISH LION INSURANCE COMPANY, LTD., WURTTENBURGISCHE FEURER, A. G., and NEW ROTTERDAM INSURANCE COMPA-



NY, LTD., paid certain monies to settle, on behalf of JACK DOWDLE, claims made against him by plaintiffs FLEMING and CEARLEY. Said plaintiff insurance companies are entitled to indemnity from the defendant UNITED STATES OF AMERICA for said sums and their costs and expenses, to be set by the Court in the subsequent trial on damages.

### CONCLUSIONS OF LAW

1. The installation of the combustion heater in N4040B was subject to F.A.A. approval, and said approval required an inspection by F.A.A. personnel or their designees.

2. The F.A.A. personnel or their designees negligently inspected the heater installation in violation of F.A.A. regulations.

3. Said negligent inspection was the proximate cause of the in-flight fire and crash of N4040B at issue herein, and the damages suffered by all plaintiffs herein.

4. The defendant UNITED STATES OF AMERICA is liable to all plaintiffs herein for all damages caused to each of them by the negligence of the defendant and its agents in causing the aircrash which is the subject matter of this action.

5. To the extent that any of the Findings of Fact set forth above are deemed to be Conclusions of Law, or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed to be Conclusions of Law or Findings of Fact, as the case may be.

Dated: 9/11/75

/s/

WILLIAM B. ENRIGHT  
Judge of the U.S. District Court  
Presented by:

JAMES H. MILLER  
Greer, Popko, Miller & Foerster

RICHARD F. GERRY  
Attorneys for Plaintiffs

JAMES H. MILLER  
GREER, POPKO, MILLER & FOERSTER  
1568 Sixth Ave.  
San Diego, Ca. 92101  
*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 70-138-E

MAXINE CEARLEY, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

JUDGMENT AFTER TRIAL BY COURT

This cause came on regularly for trial on January 29, 1975, in the above-entitled Court, the Honorable WILLIAM B. ENRIGHT, Judge Presiding, sitting without a jury, and was actually tried on said date and subsequent dates. Plaintiffs appeared by attorney JAMES H. MILLER and defendant UNITED STATES OF AMERICA appeared by JOSEPH P. COOK of the United States Department of Justice, and MICHAEL QUINTON, Assistant United States Attorney. Evidence both oral and documentary was presented by both parties, the cause was argued and submitted for decision and the Court adopted the Findings of Fact and Conclusions of Law proposed by the plaintiffs.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs jointly have judgment against defendant UNITED STATES OF AMERICA in the amount of \$150,000.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition to the above plaintiff MAXINE CEARLEY have judgment against defendant UNITED STATES OF AMERICA in the amount of \$15,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition to the above plaintiff KAREN CEARLEY have judgment against the defendant

UNITED STATES OF AMERICA in the amount of \$17,500.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition to the above plaintiff CHARLES N. CEARLEY have judgment against the defendant UNITED STATES OF AMERICA in the amount of \$17,500.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendant UNITED STATES OF AMERICA for their costs and disbursements in the amount of \$\_\_\_\_\_.

Dated: 3-22-76

WILLIAM B. ENRIGHT

*Judge of the U.S. District Court*

Judgment entered on Mar 26, 1976.

CEARLEY—HEARING 6/10/80  
IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 70-0138-E

71-0036-E

71-0037-E

71-0038-E

71-0039-E

MAXINE CEARLEY, ET AL., SCOTTISH INSURANCE CO., ET  
AL., KATHLEEN M. FLEMING, ET AL., SIMONE WEAVER, ET  
AL., JOHN WILLIAM DOWDLE, JR., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
San Diego, California  
June 10, 1980

D. JOAN KING, OFFICIAL REPORTER

*CSR License Number 2335*

*United States District Court*

*940 Front Street*

*San Diego, California 92189*

*Telephone: (714) 234-7029*

SAN DIEGO, CALIFORNIA, TUESDAY, JUNE 10, 1980,  
9:00 A.M.

[3]THE COURT: All right, Mr. Clerk.

THE CLERK: Yes, your Honor.

Number two on the calendar, Cases Number 70-0138-E, civil, Maxine Cearley, et al., versus United States of America, Number 71-00-36-E, civil; Scottish Insurance Company, et al., versus United States of America; 71-0037-E, Kathleen Fleming, et al., versus United States of America, 71-0038-38-E; Simone C. Weaver, et al., versus United States of America; and Case Number 71-0039-E, civil, John William Dowdle, Jr., versus United States of

America, for hearing on remand from the U.S. Court of Appeals.

THE COURT: Good morning, ladies and gentlemen.

MR. GERRY: Good morning, your Honor. Let the record show that the plaintiffs are ready, and that Richard F. Gerry and Marcia Hughes represent all of the plaintiffs, with the exception of the Cearleys, and that they are being represented by Mr. James Miller.

THE COURT: All right, and I note the presence of Mr. Miller.

MR. QUINTON: Assistant U.S. Attorney Michael Quinton for the United States.

THE COURT: Ladies and gentlemen, fine. Are you ready to proceed?

[4] MR. GERRY: We are ready to proceed, your Honor, but I think maybe we would like a little bit of guidance from the Court as to how the Court would wish us to proceed.

THE COURT: All right.

MR. GERRY: I received a call yesterday from Mr. Quinton. We have come here today prepared to present testimony from some witnesses. Mr. Quinton, I believe, is somewhat surprised by that, from what he told me yesterday, and I had understood that today was the time for further trial.

Even considering the fact that I believe it is the time for further trial, we still would appreciate some indication from the Court as to the scope that the Court thinks that further trial would require. Understanding the remand, as we do, we feel that our evidence will be mainly aimed at the one aspect of the good Samaritan rule. That would be reliance on behalf of the specific and general people involved; and I believe that we are prepared to go forward and commence that today. I don't know what the Government's position on that is, or, unlike most situations, we have had no pretrial, of course.

THE COURT: All right. Fine.

Let me hear from Mr. Quinton, and then I will be happy to resolve it.

MR. QUINTON: Yes, your Honor. if it please the Court, Assistant United States Attorney Michael Quinton for the defendant, United States.

[5] I talked to Mr. Gerry yesterday, after I had talked to Mrs. Boisseau; and at this time, when I talked to Mrs. Boisseau, I heard for the first time that there might be further testimony offered.

The reason I was surprised, is that it doesn't appear to me that the plaintiffs' briefs contemplate the presentation of any further testimony or any further evidence of any kind.

The last paragraph of the plaintiffs' trial brief—that is the first brief submitted by the plaintiff—says that they will ask the Court to make additional findings without giving any proposed findings.

The plaintiffs' rebuttal brief was based almost entirely upon, again, talking about the negligence, per se, arguments, and bringing up a new case, the *Griffin* case, of which the plaintiffs thought it would be necessary to advise the Court.

The focus of the briefs submitted by the plaintiffs were, as pointed out in the defendant's brief, almost entirely devoted to the negligence per se argument; that is their argument that a violation of the Federal Aviation Regulations by an employee of the United States is negligence, per se, and requires finding of liability by the Court.

I came here—or at least as of yesterday, I was prepped to argue that point; and I think that that contention [6] is adequately disposed of in the text of the opinion remanding the case back to this Court. I did not contemplate the taking of any further testimony. As, of course, the Court knows, there has been no submission of any further memoranda of contentions of fact and law by either side. There has been no pretrial order submitted for focusing the issues which the Court might decide at this time.

At this point, I have no clue as to what the plaintiffs might offer to the Court and what further evidence they might intend to ask the Court to hear. Had I been advised of the fact that the plaintiffs would be offering further testimony by their briefs, then I would have attempted to have undertaken some discovery and to have gotten, per-

haps, some expert advice of my own; but, as of yesterday, I was advised for the first time that there would be an offer of testimony and further evidence to be submitted by the plaintiffs.

THE COURT: All right. Thank you.

Well, gentlemen, I find myself agreeing with both of you, and I will tell you what I conceive the function to be.

As you know, since the remand, I have asked counsel to submit briefs relative to those issues that they feel remained after the remand; and I certainly contemplated that either party may desire to present additional evidence. I think the remand shifted the focus, relative to the liability [7] issue; and I think both parties would be then entitled to present additional evidence in view of the nature of the remand from the Ninth Circuit.

I can understand Mr. Quinton's concern now. I didn't anticipate the formalism of a pretrial conference relative to additional testimony. I thought that, if either party desired to present additional testimony today, that would certainly be appropriate.

I think, gentlemen, when I say I agree with both counsel, I agree with Mr. Quinton that the remand from the Ninth Circuit, I think, focused the entire inquiry, now, on the good Samaritan doctrine.

Negligence, per se, I think, has been resolved by that decision.

I agree with Mr. Gerry on the nature of the focus now. I think, after reading the briefs, if you are looking for direction from me, I think the remand dealt with three areas: which state law applies, whether that state has adopted a good Samaritan rule, and, if so, whether the plaintiffs' case satisfies the elements of the rule.

There has been a discussion in the briefs about the laws of California and the laws of Texas. I would think, in the final analysis, that the laws of California would probably be applicable, utilizing the laws of Texas; but I think it's almost an academic discussion, because both Texas [8] and California have a good Samaritan doctrine and employ the test as enunciated by the restatement. So, I think that we come to the same focus, whether or not this plaintiffs' case



satisfies the elements of the good Samaritan doctrine to permit recovery; and I also have a tendency, as I read that test, the essential inquiry, as to whether or not the failure to exercise care would increase the risk of the harm; or, secondly, whether the harm was suffered because of the plaintiffs' relying upon the undertaking.

I would think that the plaintiff would have a very difficult role in establishing that the failure to exercise care increased the risk; and I would think the focus in this case now, and I would think additional evidence would be permitted for either side in that regard, would be on the question of reliance; so, if either party desires to present testimony as to reliance, I think that that's well within the parameters of the remand.

Now, that's where I am, gentlemen; and, in my brief remarks, I have indicated my position on some of the legal issues raised by the remand.

I only do that on a tentative basis, so that you can at least be aware of my thinking concerning the case; and I really do think that the issue is a very narrow one now, and it's whether or not the plaintiffs' case can show reliance, under the good Samaritan doctrine, as set out in the law of [9] both Texas and California.

Now, having said that, do you have any substantial quarrel with what I have just said, as to the focus, Mr. Gerry?

MR. GERRY: No, I don't, your Honor, except, of course, that I have some disagreement with the ability to show increased risk. I appreciate your Honor's comments. I think that we were ready to focus our attention on reliance here today.

THE COURT: You have, then, no quarrel, really, with what I have said, and I won't limit your evidence on increasing the risk, if that be your—or to hear argument on that point, sir.

All right. Now, Mr. Quinton, having in mind what I just said, do you have any real quarrel with what I have said?

MR. QUINTON: No, your Honor. I agree completely, except, of course, we contend that Texas law applies. That's covered in the briefs. I agree, it doesn't make a lot of difference, frankly; but, as to what we are supposed to

be deciding here today, I did not know whether Mr. Gerry was going to claim increased risk or not. That was one of my concerns, frankly, when I was standing up here talking. I did not know whether he was going to present some evidence that there was a modification, as in our need, insisted upon by the inspector. That would be a surprise to me, a totally new [10] issue in the case.

I agree that reliance is the essential element, and that the inquiry should focus on that; and I might add that it is our contention that the reliance must be by the insured party and not by the plaintiff; if the plaintiff in the suit be different from the injured party, that the injured party is the one who must have relied upon the conduct.

THE COURT: We'll deal with that within the confines of the evidence and the discussion.

Gentlemen, that being so, I think we now have reached an understanding. At least there is no quarrel with my statement that I have heard; and it's now how best to proceed.

MR. QUINTON: If I may ask one indulgence of the Court.

If we get to the point where I feel that it would be helpful to have some discovery on what has been presented, I would ask leave of the Court at that time to reserve further cross-examination or reserve cross-examination entirely, or to reserve the right to present evidence at some later time.

THE COURT: All right. Now, I don't think that's an unreasonable position at all, Mr. Quinton; so that, if it doesn't do any disservice to the parties, I would like to hear whatever evidence you care to present today, Mr. Gerry.

You may reserve further cross-examination, if you [11] like, Mr. Quinton, and I would give you, if you desire it, a continued date so that you may either present additional evidence, or continue with any reserved examination.

Is that a satisfactory procedure to you?

MR. QUINTON: Yes, your Honor.

THE COURT: Is that a satisfactory procedure, Mr. Gerry?

MR. GERRY: It is, your Honor, with one possible exception.

We would like to present to the Court additional evidence by Mr. Holladay. We are unable to do that today because Mr. Holladay is in—

THE COURT: You may have that right.

MR. GERRY: He is out of the country.

THE COURT: You may have that right, sir.

MR. GERRY: So, what I would suggest is that, if counsel would like additional discovery as to Mr. Holladay, possibly we can do that before we present this testimony at the time next time.

THE COURT: That is fine. I would think that is a reasonable position, also.

So, let's do this, gentlemen, then.

You may present your testimony today. I will permit you to reserve for further testimony, specifically Mr. Holladay. If you will present him, I am sure that Mr. Quinton may want to examine him prior to that time, and I [12] am sure reasonable arrangements can be made for that purpose, and you may reserve the right to further cross-examine the witness presented today, Mr. Quinton, and also present additional evidence.

We'll set that date at a reasonable time for both your calendars.

All right. With that in mind, Mr. Gerry, do you desire to present evidence at this time?

MR. MILLER: Your Honor—

MR. GERRY: There is one other thing, however.

In your Honor's statement, I believe you were looking at three twenty-three of the restatement, which has the two elements—(a) failure to exercise such care increases the risk of harm, and, (b) the harm suffered because of the other's reliance, and your Honor did not direct his attention to three twenty-four (a), which has a third element, and that is that the actor has undertaken to perform a duty owed by the other, to the third person, and I think that that is present in this case, where the Government has undertaken the duty owed by the carrier to the third persons here.

THE COURT: All right. In any event, certainly you may proceed on that basis, and I will be happy to hear argument on that basis.

Mr. Miller?

MR. MILLER: Yes, your Honor. One point. I have a brief [13] appearance in State Court at 11:15. I wondered if I might be excused briefly. Our arrangement is that Mr. Gerry is going to do most of the—

THE COURT: Is it satisfactory for your purposes, Mr. Miller, that Mr. Gerry represent your interest and that of your client during your absence?

MR. MILLER: Yes, it is.

THE COURT: Is that agreeable to you, Mr. Gerry?

MR. GERRY: Yes, it is, your Honor.

THE COURT: All right. We'll proceed on that basis, and you may come and go as you like, Mr. Miller.

All right. What do you contemplate this morning, Mr. Gerry?

MR. GERRY: I would contemplate, first, just a short statement to put this matter back in focus.

Then, we have here today three witnesses. We have Mrs. Cearley, one of the plaintiffs herein; Mr. Schossow, S-c-h-o-s-s-o-w, who is, and was, at the time, a mechanic for the specific airplane, and for the airline; and Mr. Dowdle, who was the owner of the airplane.

Their testimony will not be long, I don't contemplate, and I think that we'll be able to finish fairly rapidly.

THE COURT: All right. Fine.

You may proceed, sir.

MR. GERRY: Your Honor, before we call any of the witnesses, [14] I would like to recall to your Honor the testimony of Mr. McMillan, who was the Government witness—

THE COURT: Can you do me one favor, Mr. Gerry?

What was the date of the trial or his testimony, approximately?

MR. GERRY: If the Court will indulge me just a moment, I have to get to the record.

(Pause.)

MR. GERRY: The testimony appears or begins on page 415 of the Reporter's Transcript of Proceedings on Appeal; and the date. That's Volume II of the transcript. The date appears on the front of the volume, as January 30, 1975.

Now, I am not so intimately aware at the moment of this, as to know whether that goes through the entire transcript or not.

Your Honor, this instrumentality of this tragic accident was, as you remember, a Southwind gasoline-fired heater, which was installed by Aerodyne in Dallas, Texas, and was inspected by the Government in Dallas, Texas.

Mr. McMillan, who was in charge of that procedure, testified that—by deposition, which was read into the record—that there were two methods by which a supplemental type certificate, which this called for, major modification, could be handled.

One, and the one that would be used, if the [15] supplemental type certificate modification was to be used, and in a great many aircraft, would be for full engineering drawing specifications, to be presented to the Government, whose engineers would go over the drawings and specifications and approve or disapprove the document and finally, there would be a supplemental type certificate issued.

Then, following that, the mechanics, at the repair stations, using the supplemental type certificate, the engineering drawing and specifications therein, would make the modification to the aircraft on a form 337 and would present this to—either to a designated aircraft inspector or to an FAA inspector for approval; however, in single-aircraft modifications, which this essentially was, although there were two aircraft modified the same—in single-aircraft modifications, because of the mechanics involved, the FAA did not always follow that procedure, but had another authorized procedure, which was to permit the—an as-installed modification and inspection.

Under those circumstances, Mr. McMillan testified that it was essential and part of the procedure for a Government inspector to go to the aircraft and approve the STC by inspecting the aircraft and seeing that the aircraft, as modified, with the installed heater, did—was an airworthy modification, and that's what we are dealing with in this

case, unlike the other multiple aircraft modification [16] situations.

In this case, your Honor, it appears clear that a repair station, which repairs or modifies an aircraft, has a duty to inspect any repairs, modifications, installations, as well as to—and to not only do the work properly, but to do the inspection properly.

It would appear that the Government—that they owe that duty, as a matter of common law principles, under the same principles that apply in the case of *Coffey versus McDonnell Douglas*, where the—and that when the Government steps in and takes over that duty, the Government has then assumed a duty such as is contemplated by 324(a), subsection (b), of the restatement of torts, and has undertaken to perform a duty owed by the other to the third person; that is, a duty owed by the repair station to the owner of the aircraft.

It will be, I believe, also, abundantly clear, in this case—it is my understanding, if they do tht and are performing a duty owed by the repair station to the third person, that is, the airline, and they do that duty negligently; and, as a result of that negligent performance of that duty owed by the repair station; that is, the inspection of the installation, no reliance by anyone is necessary; and you can found the liability on the assumption of the duty—breach of the duty, causation.

[17] That appears clear that the statement of Justice Wallace in the opinion, that, although he spends the majority of the time discussing the reliance aspect, he states, on page 18, on remand, "The District Judge may well need to determine, one, which state substantive law applies; two, whether that state has adopted or would apply any form of good Samaritan rule; and whether or not the appellee's case satisfies the rule as formulated by that state"; and then, in his footnotes, footnote five, on page 2, he sets forth only 323, but also 324(a), all three subsections of the restatement; so it appears clear that he contemplated the possibility of a proof under any of the subsections of 20—323 and 324(a) of the restatement.



We intend to present evidence, your Honor, which will show that this case, like the cases of *Stork* and *Ingam*, and all of the other four cases, falls within a situation where there is general reliance by the public upon the Government carrying out its duty as—assumed by it, under the Federal Aviation Act and under the Federal Aviation Regulations—its various duties to protect the safety of the traveling public.

We further intend to rely not only on that general duty and general reliance by the public, but also to present evidence through the owner of the aircraft and his mechanic, as to the procedues and the necessity for reliance by the [18] owners and the subsequent repairs of aircraft, upon the previous activities, both by the repair stations and by the Government. It could not be otherwise.

The testimony will be, your Honor, that the aircraft are certified by the Government in the beginning, given an airworthiness certificate. Subsequent thereto, any modifications require certification by the Government; and that any modifications after being carried out, are signed off and inspected by the Government; and that, when a mechanic, when an owner goes to buy an aircraft, the owner looks at the paper work that comes with the airplane.

It's impossible, uneconomical, and unreasonable to think that a—before you could buy an airplane, you would have to tear the entire airplane down and inspect it entirely. There are many places on an airplane which you can't find. You can't inspect all the engines. There are airworthiness directives that come down on the aircraft, its engines, and various parts; and those airworthiness directives have to be complied with by the mechanics, as they go along; and, when you are talking about older aircraft, an aircraft may accumulate many, many of those. Many of them may be hidden inside the engine or inside the aircraft, where you can't find them; and the lone thing that the purchaser of an aircraft or the repairman can do it to rely on paper work that has gone before, check the list of airworthiness [19] directives which he has, check to see that those have been signed off by an authorized mechanic, or inspector, and his stamp and number and signature is on there.



Once that happens, the evidence will be clear that the entire industry relies on that paper work.

In this case, part of the paper work that accompanied the De Havilland-Dove, purchased by Mr. Dowdle, was the STC and the 27, which has been signed off by the Government inspection, and the evidence will be that Mr. Dowdle, in purchasing the aircraft, clearly relied on that as being an indication that the modification had been approved by the Government and installed and inspected by the Government as approved, and that that was a reasonable reliance under the custom and practice, pertaining in the industry.

The evidence will be that Spider Aircraft and the owner thereof, Frank Schossow, Jr., were retained by Mr. Dowdle to go back and look over the airplane; and that Mr. Schossow did go back there to pick up this aircraft. He looked at all the paper work. He looked at the paper work dealing with the Southwind Heater. He found that paper work to be in order; and he therefore relied upon it and did not tear the aircraft down, take the plates off of the bulkheads, expose the whole aircraft, in order to determine whether or not it had been a proper installation; and that he did so in the [20] usual and normal course of business; that such reliance was reasonable in his normal manner of, not only himself, but all other mechanics who would have been in the same position, and that, therefore, in this case, we have not only the general reliance by the general public; but we also have the specific reliance, in this case, of the owner of the aircraft and of the repair station, Spider Aircraft in California.

Those things, we believe, clearly meet the requirements of the restatement, and it appears imminently clear that California has adopted the restatement rule, and also, imminently clear, that under *Coffey versus McDonnell*, 8 Cal 3551 (1972) the heart of the good Samaritan rule in California is that, if a private party, McDonnell, for example, undertakes, without necessity, undertakes an inspection, and conducts that inspection negligently, that that party is then liable.

With that, your Honor, that concludes my opening statement. If counsel does not have an opening statement, I am ready to call the first witness.

THE COURT: All right.

Did you desire to make any kind of brief statement, sir, or reserve it?

MR. QUINTON: I would like to reserve it.

THE COURT: All right. You may.

You may call your witness, sir.

[21] MR. GERRY: Mr. Schossow, would you come forward and be sworn, please.

THE CLERK: Do you solemnly swear that the evidence you shall give in the cause now before the Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

MR. SCHOSSOW: I do.

FRANK WAYNE SCHOSSOW, JR.,

called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please take the stand, sir.

State your name, spell your last name for the record.

THE WITNESS: Frank Wayne Schossow, Jr.,  
S-c-h-o-s-s-o-w.

#### DIRECT EXAMINATION

BY MR. GERRY:

Q Where do you live, Mr. Schossow?

A My address is 2933 Chicago Street, San Diego.

Q What is your business or occupation?

A I operate Spider's Aircraft Service and Maintenance Facility at Montgomery Field.

Q Do you hold any licenses from the United States Government?

[22] A Yes, all the engine and power plant licenses as a mechanic, and an A.I. authorization card from the FAA.

Q A.I. means authorized inspector, does it?

A Yes.

Q Does your business hold any license?

A My business is an approved repair station by the FAA.

A It is approved for engine and air frame?

A Yes.

Q How long, basically, have you been in the aviation business?

A Since 1949.

Q And you are a licensed pilot?

A Yes.

Q What licenses do you hold?

A I hold a private pilot's license with a multi-engine and instrument rating.

Q How long have you been flying?

A Since 1946.

Q With whom did you start your aviation?

A Gibbs Flying Service.

Q How long have you owned your own repair station?

A October, 1954.

Q And that repair station is located at the west end of Montgomery Field, is it?

[23] A Yes.

Q During the course of your business at Spider's Aircraft, have you had occasion to be retained by Mr. Dowdle and any of this companies to maintain his aircraft?

A Yes.

Q How long have you been doing that?

A Since about 1955.

Q And during that period of time, have you maintained De Havilland-Doves for him, amongst other things?

A Yes.

Q And, including the De Havilland-Dove which was involved in the accident that we are involved with?

A Yes.

Q Did you, in fact, at his request, go to Wisconsin and participate in the transport of that Dove from Wisconsin to San Diego at the time that Mr. Dowdle purchased it?

A Yes, I did.

Q With whom did you go back there?

A A took one of my employees and one of Mr. Dowdle's employees.

Q And when you arrived there, did you, in fact, inspect 4040 Bravo?

A Yes, we did. We spent two days back there.

Q Did you review the paper work on the aircraft?

A Yes, we did.

[24] Q Mr. Schossow, when you go to—you have bought a number of airplanes, haven't you?

A A few, yes.

Q When you buy those aircraft, do you look only at that aircraft, or do you also look at the paper work?

A We look at both.

Q Why do you look at the paper work?

A Well, if you can't fly it, the paper work isn't right.

Q Of what does the paper work consist?

A Well, the necessary paper work is the registration and the airworthiness certificate and the airplane book and the engine or engines' logs, books, and all the operating history, including the repair and alteration forms since that airplane was in use.

Q The repair and alteration forms, do those include a form known as a form 337 for any modifications or alterations?

A Yes. That is the number of the repair form.

Q Is such a form required by the Federal Government before any major alteration or repair can be made to the aircraft?

A Yes.

Q Did you, when you—when you find an aircraft that has such modifications, do you then go the aircraft, tear it down, and inspect to determine that that modification was in [25] fact done?

A Not always, no.

Q Do you rely on the paper work, then in your review of the aircraft?

A Yes, you do.

Q When you were at the—where did you go—to Wisconsin to pick up this airplane?

A Yes. Allegheny County Airport in Wisconsin.

Q When you were in Wisconsin to pick up 4040 Bravo, did you, in fact, review the paper work on that aircraft?

A Yes, we did, at this time.

Q Did you find a 337 regarding the modification of the aircraft by the installation therein of a Southwind Heater?

A Yes, we did.

Q Did you review that paper work?

A Yes, we did.

Q Was it in order?

A It certainly was, yes.

Q Did it show that the work had been done?

A Yes.

Q Did it show that the installation had been inspected by an FAA inspector?

A Yes, it did.

Q And did you rely on that as being correct then?

A Yes.

[26] Q Did you go to the aircraft and tear it apart to check that out?

A No, we did not.

Q Is that the usual and normal course of events that you do rely on those documents, as they are presented to you?

A Yes.

Q When you are given an aircraft for a hundred-hour inspection, an annual inspection, or any other inspection, do you or other people in your position—are you required to check that aircraft to determine that it has—that all airworthiness directives have been complied with?

A Yes.

Q Do you do that by checking the airworthiness directives against the airplane, or the airworthiness directives against the paper work?

A The paper work, mostly.

Q And if you find that a mechanic has signed off, as complied with, an airworthiness directive, has put his stamp with his number, and has signed his name, are you required, as—by any regulations of which you are aware, to go behind that paper work and look at the airplane?

A No.

Q And, is that so also of 337 modification forms?

A Yes. That is the same.

Q And that is exactly what you did in this case, look [27] at the form, rely on it, and rely on the people that had installed and inspected that heater, to do the job in an air-worthy fashion?

A Yes.

MR. GERRY: Nothing further, your Honor.

THE COURT: You may inquire, sir.

(Pause.)

MR. GERRY: Oh, there is one other—pardon me.

#### DIRECT EXAMINATION (Resumed)

BY MR. GERRY:

Q Do you consider that, then, to be a duty that you owe, as a repair station, to Mr. Dowdle, to check the paper work?

A Yes.

Q And if you were the one to make the modification on the aircraft, would you owe him a duty not only to install or have your mechanic install such a heater properly, but also to inspect it and sign it off?

A Yes.

MR. GERRY: Nothing further.

THE COURT: You may inquire, sir.

#### [28] CROSS-EXAMINATION

BY MR. QUINTON:

Q When you went back to Wisconsin to pick up the airplane, Mr. Schossow, this was in 1966, was it?

A Probably. It was some time ago.

Q In the late fall of 1966?

A Yes.

Q I believe you said in your testimony at trial, it was during the deer hunting season?

A Yes, it was back there.

Q Isn't that traditionally in the fall, October, November, that time of year?

A I don't know for sure.

Q You said in your testimony at trial that you flew the airplane out to San Diego from Wisconsin, that you used that combustion heater?

A Yes, we did.

Q Because it was cold?

A Right.

Q Didn't you check out that heater thoroughly before you left Wisconsin because you knew you were going to need it?

A Well, the heater worked. That's all I could tell you. It worked properly at the time.

Q Did you take a test flight of the plane before you started your trip out?

[29] A Yes, we did.

Q You took the plane out and flew it around for an hour or so to make sure everything worked?

A About 45 minutes, yes.

Q Did you check out the heater at that time, too?

A The heater was on, yes.

Q Well, how did your inspection of the airplane at this time—you said it took approximately two days—how does that compare with a regular hundred-hour inspection or annual inspection, as to thoroughness; that is, was it more or less thorough?

A The airplane was undergoing a hundred-hour inspection when we arrived back there; and the crew had gone hunting the day we got there. The next day they came back and finished up the airplane, and we took it out and flew it. It was their inspection. We simply reviewed what they had been doing and the paper work, and took a test flight in the airplane and started home the next day.

Q Did you conduct any further inspection of the aircraft on your own?

A Only getting acquainted with the airplane.

THE COURT: I missed that, sir. Let me—what did you say? It was someone else's inspection, sir?

A THE WITNESS: The airplane was undergoing an inspection by Air Wisconsin when we arrived there.

[30] THE COURT: And then you conceived your role to be what, relative to an inspection?



THE WITNESS: We went back there to learn what we could from these people of this type airplane, and they just acquainted us with the airplane, and we reviewed all the paper work on it, the work they had done, and took it out and test flew it; and the next day, we loaded all the spare parts up and flew it back to San Diego.

BY MR. QUINTON:

Q As I understand your function, sir, you are hired by Mr. Dowdle to go back there and check out the airplane to make sure the airplane was acceptable, just as you would have the car mechanic check over a used car?

A Yes.

Q He was interested in the number of hours in the engine, number of hours in the air frame, general condition of the airplane?

A Yes.

Q Did you—well, did any FAA inspectors conduct any examination of the aircraft at that time; that is, at the time that you picked it up from Air Wisconsin?

A None that I know of, no.

Q During all the time—well, strike that.

As I understand it, then, Mr. Schossow, you performed all of the routine maintenance during the time that that [31] aircraft was in San Diego, from the time that Mr. Dowdle accepted it until the time it crashed?

A That is correct.

Q Approximately two years?

A Yes, sir.

Q During that time the airplane flew approximately eight hundred to a thousand hours?

A No idea how long it flew.

Q Well, if I asked you to, if I were to inform you Mr. Dowdle has so testified, that it was some eight hundred to a thousand hours, approximately four hundred to five hundred hours per year, that would mean that you performed some eight to ten one-hundred-hour inspections?

A Yes.

Q And at least one, possibly two annual inspections?

A Yes.

Q So that would be a total of ten to twelve, at least eight times, that you inspected that airplane?

A Yes.

Q During all of that time—that is, that two years—did an FAA inspector ever inspect that aircraft?

A Well, the air taxi inspectors in our area, I am sure, looked at it on several occasions.

Q Yes, sir. I am not talking about a pilot inspection. I am talking about a maintenance-type inspection, by someone [32] who is interested in the air frame?

A Well, as an air taxi operator, the FAA maintenance people inspect them periodically, yes.

As to how many times on this specific airplane, I have no idea.

Q Did you consider it your primary responsibility to maintain that aircraft?

A Yes.

Q You did not consider it the FAA's responsibility to periodically inspect it and make sure the aircraft was airworthy?

A No.

Q And, when you performed modifications, they are then subject to supplemental type certificates. Do you consider it your primary responsibility to make sure that those modifications are airworthy?

A If we do the modifications initially, yes.

Q Even though it may also be inspected by an FAA inspector?

A Yes. If we are the installer or modifiers, we certify it first, and they certify it second.

Q That is the practice in the industry, as far as you know?

A Yes.

Q Has that been the practice at least since 1949, as [33] far as you know?

A Yes.

Q To your knowledge was that the practice of this modification—that is, Aerodyne inspected the heater installation, and then the FAA inspector inspected the heater installation?

A Yes. That would be the normal procedure, yes.

Q Do you know of any reason why that normal procedure would not have been followed in this case?

A No.

Q So, when you say you looked at the forms and you relied on those forms, you were relying not only on the inspection by the FAA, but also on the qualifications, integrity, and the engineering ability of Aerodyne Engineering?

A Yes.

Q Do you know the reputation of Aerodyne in the aviation industry, Mr. Schossow?

A I know it's a big-name outfit. I have no connection with them, have never done any business with them.

MR. QUINTON: Thank you. No further questions.

THE COURT: I had a question or two, sir.

When you went back to Wisconsin, specifically now, relating to the heater, did you, yourself, inspect that heater installation?

THE WITNESS: I saw it. It's a British-made airplane with [34] an American-made heater; and we were curious as to why, because the airplane normally had exhaust heaters from each engine; and they explain that, back in the cold country they had to have more heat; so it actually had three heaters in it.

THE COURT: All right.

So, relative to your inspection on behalf of Mr. Dowdle, and forgetting the balance of your review or your physical, visible inspection, can you tell me specifically what you did relative to that heater installation? Did you examine the paper work? Did you physically examine the entire installation? What did you do with that?

THE WITNESS: Well, we examined the paper work on it; and it was installed in the lower baggage compartment, right in sight, where you could see it, and we look at it to see what size it was and how much space it took up, and it actually was a gasoline-fired heater. We didn't tear anything apart, uncover anything, follow any lines back to the fuel tanks or anything like that.

THE COURT: Did you examine the paper work relative to the modification?

THE WITNESS: The only paper work that was with the airplane is form 337.

Whatever drawings and engineering that may have taken place ahead of that was not made available to us.

[35] THE COURT: In the course of any of your subsequent examinations or inspections, did you have any further examinations of this particular installation, the heater unit?

THE WITNESS: Well, we saw the heater each and every time the airplane was—hundred-hour or annual, yes.

THE COURT: Did you ever have anything to do with it, aside just from generally observing it?

THE WITNESS: No, sir.

THE COURT: Did you ever follow the lines back and so forth, things of that sort?

THE WITNESS: Not on this airplane, no.

THE COURT: When you testified before, you talked in terms of, I believe, not observing any chafing on any of the lines, relative to this installation?

THE WITNESS: No. I remember it was a stainless steel line from the heater, back to where they pick up the fuel; and, of course, on the sister airplane, which is identical, we did a lot of inspecting later, after the crash of the airplane.

THE COURT: But, in your examination relative to the lack of chafing, am I to assume that you followed the lines all the way back through the entire installation?

THE WITNESS: The lines went back to the main spar, and then there was a big clamp arrangement where all the lines for oil and pressure and manifold and everything went from the [36] cockpit out to the engines, and it blended right into all the rest. It was secured to the wing spar.

THE COURT: All right. Thank you.

Mr. Gerry, anything further?

#### REDIRECT EXAMINATION

BY MR. GERRY:

Q Mr. Schossow, when the line led after from the heater to the afterpart of the baggage compartment, where it passed behind a plate against that after-baggage compartment bulkhead—right?

A Yes.

Q —and, a normal inspection, you didn't take that plate off and look back there, did you?

A No.

Q All right. That isn't part of a regular inspection?

A No. That's just an access to the plumbing back there, if you have a problem.

Q So that that wasn't part of your hundred-hour inspections to look at that line all the way along, was it?

A No.

Q If the inspector had not signed that form off, would you have then been dutybound to check out that heater and get it inspected properly?

MR. QUINTON: Excuse me. I am going to object to this [37] question as being vague. I don't know which inspector he is talking about.

THE COURT: No. If you understand it, sir, if that be your question—if you understand the question, sir, you can answer it.

THE WITNESS: If the heater had not been legally installed in the aircraft, we would not have accepted the aircraft at Wisconsin.

MR. GERRY: Thank you, your Honor.

THE COURT: Anything further?

#### RE CROSS-EXAMINATION

BY MR. QUINTON:

Q In relation to the last question, I assume Mr. Gerry must be referring to the FAA inspector signing the heater installation off. Your concern is not with the airworthiness of the aircraft, per se, but, simply with the failing in the legality of the paper work. Isn't that correct? That is, you would not have accepted the aircraft for the reason that the airplane could not legally operate without all of the proper paper work?

A That's right. Yes.

Q It has nothing to do with whether or not the heater is, in fact, airworthy?

A That's right. The heater worked and the paper work [38] was all proper when we accepted the airplane.

Q Well, maybe I can word the question a little differently.

The heater can work and can be perfectly airworthy; but, if the paper work is not in order, then you can't legally fly the airplane. Isn't that what you mean?

A That is true, yes.

Q So, that was your concern, really, that the airplane had to be legal, not that the airplane had to be airworthy?

A Well, primarily, we were looking at the condition of the airplane and its paper work as one. We can't separate them.

Q But, if an inspector does not sign an inspection sheet, that does not tell you anything about the airplane?

(Pause.)

A Well, we couldn't legally fly an airplane that had equipment in it that wasn't signed off by somebody in the FAA when it isn't part of the original airplane, when it is a modification.

Q Yes, sir. But if—

MR. QUINTON: I will withdraw the question.

THE COURT: Is there anything further of this witness?

MR. GERRY: No, your Honor.

THE COURT: If not, thank you very much, sir. You may step down, and you may be excused, sir.

[39] (Witness Schossow stepped down.)

THE COURT: Is this a convenient time, Mr. Gerry, to take our morning recess?

MR. GERRY: Your Honor, if we could, I think that Mr. Miller could put his witness on now, and then he could go at 11:15, if we could take our recess then.

THE COURT: Will this be a short witness?

MR. GERRY: Yes, your Honor.

MR. MILLER: Yes, your Honor. Mrs. Cearley will be, your Honor.

THE COURT: All right. Certainly.

THE CLERK: Raise your right hand, please.

You do solemnly swear that the evidence you shall give in the cause now before the Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

MRS. CEARLEY: I do.

**MAXINE CEARLEY,**

called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

**THE CLERK:** Would you state your name and spell your last name for the record, please.

**THE WITNESS:** Uh-huh. I am Maxine Cearley, C-e-a-r-l-e-y.

[40]

**DIRECT EXAMINATION**

**BY MR. MILLER:**

**Q** Mrs. Cearley, your husband, who was killed in this aircraft, he was an engineer with General Dynamics. Is that correct?

**A** That is true.

**Q** And prior to his working for General Dynamics in the San Diego area, he had worked for them in Texas. Is that correct?

**A** Yes. That is true.

**Q** And, in Texas, the product that they were manufacturing was aircraft rather than missiles, was it not?

**A** Yes. It was the B-36.

**Q** And he—how long did he work on the aircraft as opposed to missiles portion, General Dynamics work?

**A** Well, he was working for Convair in Fort Worth since—I believe it was '49 he started working for Convair.

**Q** And then, at what point in time did you come to San Diego?

**A** In June of '56.

**Q** Now, calling your attention to—I am asking you to go back in time now quite a long way. We are talking about before 1968, the time of the air crash. Were you aware of the Government playing any role in the safety of airplanes that carried passengers for hire?

[41] **A** Certainly. Every time I traveled by air, I was assured that there was adequate inspection on airplanes. Otherwise—I wouldn't have traveled, otherwise.

**Q** Was your husband also aware of this, of this fact that the Federal Government was involved in the insuring safety of aircraft, or trying to insure the safety of aircraft?



A Oh, I am sure he was, because of his work with the aircraft industry, and he expected competent inspections of security and safety of the airplane.

Q And, this was—do you believe this to have been his state of mind prior to flying on the airplane when it crashed?

A Certainly.

MR. MILLER: I have no further questions.

THE COURT: You may inquire, sir.

### CROSS-EXAMINATION

BY MR. QUINTON:

Q Mrs. Cearley, you did not discuss this flight on this aircraft on this date with Mr. Cearley, did you?

A No.

MR. QUINTON: No further questions.

THE COURT: All right. Thank you, ma'am.

You may step down.

[42] Is there anything further of this witness?

MR. GERRY: No, your Honor.

THE COURT: All right. Thank you very much, ma'am.

You may step down, and you may be excused.

(Witness Maxine Cearley stepped down.)

MR. GERRY: This would be a convenient time, I think, your Honor.

THE COURT: All right. Thank you.

Let's take a recess. We'll be in recess for 15 minutes. We are in recess now.

(Recess.)

THE CLERK: The United States District Court is once again in session. Please come to order.

THE COURT: Good morning again, ladies and gentlemen.

I would find counsel present; Mr. Miller is now absent.

All right, Mr. Gerry, you may call your next witness.

MR. GERRY: If the Court please, the plaintiffs will call Mr. Dowdle.

THE COURT: All right, sir.

MR. GERRY: Step forward, Mr. Dowdle.

THE CLERK: Please raise your right hand.

Do you solemnly swear the evidence you shall give in the cause now before this court shall be the truth, the [43] whole truth, and nothing but the truth, so help you God?

MR. DOWDLE: I do.

JOHN WILLIAM DOWDLE, JR.,

called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please take the stand, sir.

State your name, spell your last name for the record, please.

THE WITNESS: John William Dowdle. Last name is spelled D-o-w-d-l-e.

#### DIRECT EXAMINATION

BY MR. GERRY:

Q Mr. Dowdle, you are one of the plaintiffs in this action are you not?

A Yes, sir.

Q And, at the time of the accident with the De Havilland-Dove, 4040 Bravo, you were the owner of that aircraft?

A Yes, sir.

Q And that aircraft was flying under one of your d/b/a names of Catalina Vegas Airlines?

A Yes, sir.

[44] Q Did you purchase that aircraft from Air Wisconsin?

A Yes, sir.

Q And, at the time that you purchased it, did you personally inspect that aircraft?

A No, sir.

Q Did you engage someone else to look at the aircraft for you to determine whether or not it was in airworthy condition before completing the purchase of the aircraft?

A Yes, sir.

Q Who did you retain?

A Mr. Schossow, Spider.

Q And, did you send him to Wisconsin for that purpose?

A Yes, sir.

Q You have purchased many aircraft in your career in the aviation business, haven't you?

A Yes, sir.

Q How long have you been in aviation?

A Since 1946.

Q Do you, yourself, hold any licenses issued by the—any agency of the Federal Government?

A Yes, sir.

Q What licenses do you possess?

A Pilot, commercial, multi-engine, single, sea, land, instrument.

Q You have been flying since '46?

[45] A No. I have been flying since '39; commercially, since '46.

Q Have you had occasion in the purchases of those aircraft to look at the paper work of the various aircraft you have purchased?

A Yes, sir.

Q And do you know what the procedure is in purchasing an aircraft, insofar as the paper work is concerned? What do you look for?

A You look for the compliance of all bulletins or aircraft directives that applied to the aircraft, the conformity that they are signed off, as well as the log book time, the air frame time; that the paper work is the first responsibility.

Q When you look at an aircraft directive or airworthiness directive, an AD, you—this indicates that there is some work that is mandatory that be done before the aircraft can fly, does it?

A Yes, sir.

Q And then you look to see that that AD has been complied with. Is that right?

A Yes, sir.

Q That's in the paper work?

A Yes, sir.

Q If it hasn't been complied with, is that aircraft, by definition, airworthy to fly?

[46] A No, sir.

Q It's illegal to fly it. Right?

A Yes.

Q Now, also, would you, as a—an individual, who is a pilot, who has been in this business a long time, also be worried about the actual airworthiness of the aircraft, if the AD's haven't been complied with?

A No. If the AD is complied with and signed off, that is an indication it's airworthy.

Q But, suppose they weren't complied with and signed off, would you actually worry about the airworthiness of the aircraft?

A Of course.

Q Those AD's are issued by the Federal Government, aren't they?

A Yes, sir.

Q They indicate if something may possibly be wrong with that aircraft, don't they?

A Yes, sir.

Q If a mechanic has not said that he has checked it out and complied, would that indicate to you, if you flew the aircraft, without compliance, without sign-off, that you might be flying an unworthy airplane?

A Yes, sir.

Q Mr. Dowdle, in your advertisement to the general [47] public, as Catalina Vegas Airlines, did you mention any Government approval of your operation?

A Yes, in all of our advertising, we carried that.

THE COURT: Carried what, sir?

THE WITNESS: U.S. Government approval.

BY MR. GERRY:

Q So that—and do your passengers ask you about that?

A Sometimes.

Q You hold a—your business holds a certificate from the Government, as well as you personally holding the certificate. Right?


A Yes, sir.

Q What is that certificate?

A Swift Air Service, Catalina Vegas Airline, d/b/a J.W. Dowdle. It's an air taxi certificate under Part 135 of the Federal Air Regulations.

Q Federal Air Regulations now?

A It used to be Civil.



Q Does that document give the Government the right to inspect your aircraft?

A It certainly does.

Q Do they periodically inspect your aircraft?

A Yes, sir.

Q When they inspect your aircraft, what do they look at?

[48] A Paper work compliance.

Q So that they take the log books, do they?

A Yes, sir.

Q Any alteration forms?

A Yes.

Q If there has been an alteration to the aircraft or a modification to the aircraft that requires a 337 form, does that form have to remain with that aircraft for the life of the aircraft?

A Yes.

Q And then, the FAA inspectors, do they, when they check over the aircraft, look at those forms?

A Yes, sir.

Q Do they make you take the airplane apart to show that the form was actually complied with?

A No, sir.

Q Do they actually go into the aircraft and actually inspect the airplane itself?

A No, sir.

Q They rely on the paper work?

A Yes, sir.

Q Do you carry all persons that come and pay your fares? Do you advertise yourself as a common carrier for hire?

A Yes, sir.

Q And did you see the paper work on 4040 Bravo?

[49] A After return from Air Wisconsin, very briefly, because I depended upon Spider to do my maintenance. That's what he is paid for.

Q Did you see anything wrong with the paper work when you went over it?

A No, sir.

Q If you had been told that a Southwind gas-fired heater had been installed in that aircraft, and there was not a 337 form for it, would you have flown that aircraft?

A No, sir.

MR. GERRY: Nothing further.

THE COURT: You may inquire, sir.

### CROSS-EXAMINATION

BY MR. QUINTON:

Q Did I understand your testimony, Mr. Dowdle, to be that you did not know whether or not there was a 337 form for the Southwind Heater installed in 4040 Bravo?

A I think you are misunderstanding what I said.

Frank Schossow, Jr., is my maintenance man. He is the one I rely on the paper work simply because that is his expertise. Mine is flying.

Q Yes, sir. You did not inspect—you did not look for a 337?

A I didn't look for anything specifically, because he [50] had already inspected it.

Q Yes, sir. You said that, when the FAA inspects your operation, as I understand, essentially, it's just an audit. Is that correct, sir?

A Well, they usually will sit in the aircraft, go through all of the paper work, the log book, and look for currency, as far as the hundred hours, the annuals, the AD's are complied with.

Q I believe you said the—their inspection is essentially a paper-work inspection or an inspection of—

A Primarily, yes.

Q Who is responsible for preparing the paper work for the FAA?

A Are you talking about the paper that came with the airplane when we bought it, specifically, or any paper work?

The mechanics, the maintenance people.

Q Thank you. People who are working for you?

A Yes, sir.

Q So they can only know what you make available for them to see?

A No. I don't have that paper work. That stays with the airplane.

Q You have been in the aviation business—you have been flying, as I understand it, since 1939, sir?

A Yes, sir.

[51] Q You have been flying for hire since that time?

A Well, as a Navy pilot, during World War II; and after 1936, I established my own business.

Q So, you have seen the role of the FAA, or the CAA, as it was before that, increase during your career from a relatively minor role to what is now a much more active role in the regulation of aviation. Is that right, sir?

A Yes, sir.

Q And when you started flying passengers for hire, of course, you assume that it was primarily your responsibility to assure the safety of your passengers and those who entrust their care to you during flight?

A Yes. As far as maintenance is concerned, that's the maintenance department. Flying is mine.

Q Yes, sir. Do you feel that your obligation is any different, at that time, in 1980, from what it was in 1946; that is, your obligation to assure the safety of your passengers?

A Absolutely. It's the same.

Q Do you feel that the obligation of every other person who works on aircraft and who also has a duty to assure the safety of passengers is the same?

A Absolutely.

Q So, the role of the FAA, in a more strict, regulatory function, you don't feel changes duty?

A No.

[52] Q You don't feel it changes the duty of an installer of an aircraft heater, for instance?

A No.

MR. QUINTON: Thank you. Nothing further.

#### REDIRECT EXAMINATION

BY MR. GERRY:

Q Mr. Dowdle, when you first went into the business of carrying passengers for hire in 1946, there was no FAA. There was a CAA. Right?



A Correct.

Q And at this time, if you wanted to make a modification for an aircraft, it was your duty to make that modification and to—or have your mechanics make it, and to inspect that modification, and to assure that it was an airworthy modification, without any governmental interference.

Wasn't that right?

A I don't follow the question.

We still had the CAA.

Q Yes, but they didn't—you didn't have a 337 form, did you?

A Not to my recollection.

Q The—you would modify the airplane and inspect it and sign it off. Right?

A Mechanics would. Yes, sir.

[53] Q Subsequently, it was changed so that you couldn't modify the airplane without the Government inspecting it and signing it off, wasn't it?

A I don't remember the date, but that's very true.

Q And, at that point, the role changed, and the Government took over for what your mechanic—

MR. QUINTON: Well, I object.

THE COURT: Let him finish the question.

BY MR. GERRY:

Q —what your mechanics used to do and what your inspector used to do. Right?

A Yes, sir.

MR. QUINTON: The question is not a question. It's an argument.

THE COURT: I will sustain the objection as to the form of the question.

You might rephrase your question. The answer may go out.

MR. GERRY: All right.

Q Did the Government then take over some of the functions of the inspectors?

A By "inspectors," you mean—

Q The private mechanic repair station inspectors.

A Yes. They took over the supervision.

MR. GERRY: Thank you. Nothing further.

[54] THE COURT: Anything further of this witness, Mr. Quinton?

MR. QUINTON: Just one question.

### RECROSS-EXAMINATION

BY MR. QUINTON:

Q Is it still your understanding, Mr. Dowdle, that a repair station that installs a piece of equipment on an aircraft also inspects that piece of equipment after they install it?

A That is correct.

MR. QUINTON: Nothing further, your Honor.

THE COURT: Anything further?

MR. GERRY: Nothing further, your Honor.

THE COURT: Thank you, sir. You may step down, and you may be excused, sir.

THE WITNESS: Thank you.

(Witness Dowdle stepped down.)

THE COURT: Any further evidence on your part, Mr. Gerry?

MR. GERRY: We do not have at this time, your Honor.

We would like to reserve the possibility of calling Mr. Holladay; or, if we can't get him in a reasonable time—I am not sure when he is coming back from Sweden—someone else in his stead.

THE COURT: All right. How much time would you want for that purpose?

[55] MR. GERRY: I would think that we would be able to do ours in half an hour to an hour.

THE COURT: How much time from this date?

MR. GERRY: As I recall, Mr. Miller was in contact with him, and he said that he should be back about the first of July, your Honor.

THE COURT: What are your plans, Mr. Quinton? Will you be presenting any evidence on behalf of the Government?

MR. QUINTON: I don't think so, your Honor. I would, after Mr. Holladay, or whoever plaintiffs care to present, after we discover what he will have to say, we may want to

present some evidence. Based upon what we have heard so far, I don't believe, today—

THE COURT: At this juncture, do you contemplate recalling any of the witnesses who testified this morning?

MR. QUINTON: I don't think so, your Honor. I would like to review their testimony, and have, perhaps, someone in the FAA Legal Counsel's Office review it, so that they may know.

THE COURT: All right.

Well, gentlemen, let's do this, then.

If Mr. Holladay—I will be happy to, say, set this case sometime during the course of July; and I would assume, with one further session, we could complete the inquiry, both as to testimony and as to argument. If Mr. Holladay is to return on the first, or approximately then, [56] and he will be called, I would assume arrangements could be made forthwith for the taking of his deposition, if that is considered appropriate by the Government; and I would also assume that, if the Government desires to recall any of the witnesses who testified this morning, they could so notify Mr. Gerry, and he might make them available.

I would prefer, if we could, gentlemen, say, to set this for the second week in July with the thought that all testimony could be completed that day.

I assume you will have a deposition of Mr. Holladay prior to that time; you would know whether you would want to call witnesses; and I would assume those witnesses will be called on the date that we now agree on.

Does that seem reasonable, Mr. Quinton?

MR. QUINTON: Well, that doesn't give us much time. Mr. Holladay is not going to be back until the first of July, that's a Tuesday, and the second week would be six days later. That would give us a very short time.

THE COURT: I would assume that, if you wanted to depose him—the only problem I have, Mr. Quinton, I will be gone for two weeks in July. I hesitate to put it over to the end of July, unless there is no alternative. It would be my thought to set it for the ninth.

If we can't go forward and complete it on that day, then it would be my thought to set it, say, on the 30th [57] of July.

Now, given those choices, I assume you would prefer the 30th. Is that correct, Mr. Quinton?

MR. QUINTON: Yes, your Honor.

THE COURT: What about you, Mr. Gerry?

MR. GERRY: Well, I would much prefer the 9th, your Honor, and I would think that Mr. Holladay would be back and his deposition could be taken.

THE COURT: Why don't we do this—let's plan on the 9th, Mr. Quinton, and, if you have some insurmountable problem, I will be happy to consider some additional time; but let's plan on presenting additional testimony on the 9th, and then, if you have a problem, as I say, I will be happy to hear from you then.

MR. GERRY: I have been informed by Mr. Miller that Mr. Holladay should be back on the 16th of June, so I think that will solve the problem.

MR. QUINTON: That doesn't help my problem at all. I am going to be gone for two weeks starting the 16th of June, so will not be back until the June 30, in any event.

THE COURT: Well, let's plan on the 9th, gentlemen, then, for the completion of the testimony, if that's a convenient time for both counsel; and then, as I say, I would not foreclose an opportunity, if you do have a real, serious problem, Mr. Quinton.

[58] All right?

MR. QUINTON: Yes, your Honor. Thank you.

THE COURT: All right.

Is there anything further, then, gentlemen, and I assume counsel will be prepared to argue the case, then, too?

MR. GERRY: Yes, your Honor.

THE COURT: If there are any additional point of law, or any more specific focus that either counsel wants to present by way of additional memorandum, I would welcome them. I do think the issue really resolves itself, in my judgment, at least, and I will be happy to hear argument on all phases of the case that counsel feels is appropriate, but I would like very much the attention directed to the reliance issue.

MR. GERRY: Thank you, your Honor.

THE COURT: Thank you very much, gentlemen.

All right. We will be at recess at this time. We are at recess now.

THE CLERK: Will that be at nine o'clock, your Honor.

THE COURT: That will be at 9:30.

THE CLERK: Yes, your Honor.

THE COURT: Thank you.

[3] SAN DIEGO, CALIFORNIA, FRIDAY,  
SEPTEMBER 12, 1980, 11:00 A.M.

THE COURT: Good morning, ladies and gentlemen. My apologies for the delay.

All right, Mr. Clerk.

THE CLERK: Number two on the calendar, Cases Number 70-0138-E, 71-0036-E, 71-0037-E, 71-0038-E, 71-0039-E, Maxine Cearley, et al., versus United States of America, for further hearing on remand from the U.S. Court of Appeals.

MR. GERRY: Richard F. Gerry appearing for all of the plaintiffs, except Cearley, along with Marcia Hughes of my office.

MR. MILLER: James Miller appearing with the plaintiffs Cearley, your Honor.

MR. QUINTON: Michael Quinton for the United States Attorney, your Honor.

THE COURT: All right, gentlemen, I have in mind the evidence presented on June tenth of this year. Is there anything addition at this time, Mr. Gerry, on behalf of your clients?

MR. GERRY: Yes, your Honor. We have a witness this morning, David Holladay, that we would like to present; and we did, your Honor, file with the Court, on September 12, 1980, a request for judicial notice of the FAA Historical Fact Book, the Code of Federal Regulations, and some other [4] items; and I would assume that, since we have received no objections to those items and since they are matters that clearly fall within the Rule 201, and the United States Code 44, Section 1507, that the Court will take judicial notice of those matters.

THE COURT: All right.

Any objection to the request for judicial notice, Mr. Quinton?

MR. QUINTON: Whatever date this may have been filed, your Honor, I received it on September 15; and I do object.

I don't think the FAA Historical Fact Book is a proper item for judicial notice. Whether or not it's material is another matter entirely; but I just don't think it's something that can be judicially noticed under any recognized authority. I don't think it—I have seen no authority other than Rule 201, and I don't think that's enough. As far as the Code of Federal Regulations, the date, which is on the regulations, on page one, says January 1, 1969. I think it's pretty clear, very clear that whatever regulations may be cited to the Court must be those regulations which were in effect at the time the alleged negligent act in this case took place, which was 1965; so, I think that those are clearly improper and should not be noticed; and the same objection would apply to the handbook, 8110.4. The date is December 28, 1967. Certification of this aircraft took place again in [5] 1965.

So I do object to those as far as the California Civil Code and United States Code. Those are proper items for judicial notice; but, then, I don't think it's necessary to file the document and ask the Court to take judicial notice of those.

THE COURT: Well, Mr. Gerry, it's a matter of first impression with me, unless you desire to be heard.

May I have your filing of requested judicial notice? May I see that?

(Pause.)

THE COURT: I would think, Mr. Gerry, absent some authority to the contrary, I think the Code of Federal Regulations had they existed at the time of the accident, would be appropriate; and also the United States Code and those portions of the California Civil Code that you would offer. I would have some difficulty, particularly with objections, to receive, by way of judicial notice, pursuant to Rule 201, the FAA Historical Fact Book and also the handbook that you have talked about, sir.

MR. GERRY: Your Honor, I think that the law is now clear under the new rules of evidence, the Federal Rules of Evidence, that the Court has the power to take judicial notice; and, I think, may be required to take judicial notice of any document which is an official publication of the United States [6] Government or a state government when it is recognized, and must be recognized that that document is prepared by that government in accordance with its official function, and—

THE COURT: If that were true, police reports would come in by way of judicial notice.

MR. GERRY: No. They are not publications. Police reports are not published documents; and—

THE COURT: Well, gentlemen, I don't want to—if there is some testimony to be given today, I would certainly reserve ruling on that and let you submit any authority you have to support those now contested items relative to judicial notice; and I would ask you to do the same, Mr. Quinton; and I will be happy to rule on it; but I would assume it's a question of it's either in or it isn't, but I would be happy to rule on it on the basis of some authority rather than our colloquy here today.

MR. GERRY: Your Honor, not to belabor the point, but Mr. Holladay intends to base, in part, his opinion on some of these documents.

THE COURT: All right. He may be, subject to a motion to strike.

You can go forward with your testimony.

MR. GERRY: At this time, your Honor, if the Court please, we would like to call Mr. Holladay, David Holladay.

THE COURT: All right, sir.

[7] THE CLERK: Raise your right hand, sir.

You do solemnly swear the evidence you shall give in the case now before this Court shall be the truth, the whole truth, and nothing but the truth?

MR. HOLLADAY: I do.

DAVID HADDON HOLLADAY,  
called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

THE CLERK: Please take the stand.



State your full name and spell your last name for the record, sir.

THE WITNESS: David Haddon Holladay, H-a-d-d-o-n H-o-l-l-a-d-a-y.

#### DIRECT EXAMINATION

BY MR. GERRY:

Q Mr. Holladay, you have previously testified in this case, a few years back, when it was first here.

MR. GERRY: Taking that into consideration, your Honor, I—we can, if you desire, go through Mr. Holladay's qualifications again—

THE COURT: No. I am satisfied. I have a recollection of those events, sir, and you may supplement the record pursuant to the mandate; but I have in mind the testimony [8] previously given.

MR. GERRY: Thank you very much, your Honor.

BY MR. GERRY:

Q Since the time of your testimony here before, have you continued in the same line of work, sir?

A Yes, sir.

Q And can you briefly outline what you have been doing in the interim, in that line of work?

A During the interim period, I have been, as you stated, continuing in the same line of work, which is investigating the crash of aircraft, as follow-up in investigative processes carried out by the United States Government. I have been participating as a consultant to numerous entities, organizations, and activities, including law firms; and have been deeply and extensively involved in aviation litigation arising out of those crashes, both in state and in federal courts.

In addition to that, we have enlarged our activities in the area of aviation accident prevention, education, and training, a part of which is a continuation of the courses offered by the Royal Institute of Technology in Stockholm, Sweden, which are presented twice each year.

These courses have now reached the extent that they are being enlarged to include other areas, such as a specialized course in helicopters.

[9] Q Did you, Mr. Holladay, pursuant to our request, on behalf of the plaintiffs, do an historical study of the role of the Government in the aviation field and specifically with regard to the Government's role in the certification of aircraft?

A Yes, sir.

Q And, as part of that, did you review a great many publications, Governmental, as well as others?

A Yes, sir.

Q Amongst those, did you review the FAA Historical Fact Book?

A Yes, sir.

Q Is that, in fact, a Governmental publication?

A Yes, sir, it is.

Q Officially put out by the Department of Transportation, the Federal Aviation Administration?

A Yes, sir.

Q And obtainable through the Government Printing Office?

A That is correct.

Q When, Mr. Holladay, did the Government first become involved in the certification for airmen or aircraft in the United States?

A In 1926, specifically, May twentieth.

Q And, at that time, as I understand it, President [10] Coolidge signed the first Air Commerce Act into law. Is that right?

A That is correct.

Q What was the purpose of that law, sir, as stated?

A That Act instructed the Secretary of Commerce to foster air commerce, designate and establish, operate and maintain aids to air navigation, except airports, arrange for research and development to improve such aids; license pilots; issue airworthiness certificates for aircraft and major aircraft components, and investigate accidents.

Q Prior to the time in 1926, when the Government entered the field, were aircraft being manufactured in the United States?

A Yes, sir.

Q Were they being modified in the United States?

A Yes, sir.

Q Were they being altered in the United States?

A Yes, sir.

Q Was that being done by the Government or by private parties?

A It was being done by private parties.

Q Was any Governmental approval required for the manufacture, alteration, repair, or modification of aircraft prior to the Air Commerce Act of 1926?

A No, sir.

[11] Q Following the passage of the Air Commerce Act of 1926, did the Government then actually begin to license pilots and mechanics?

A Yes, it did.

Q About when?

A On December thirty-first, when the Air Commerce Act of 1926 went into effect, the regulations, which were a part of that Act, also became effective; and, as part of that, required that all pilots engaged in interstate commerce were required to secure transport or industrial pilot licenses, or both; that all mechanics who had been engaged in commercial aeronautics were required to secure either engine or aircraft mechanic licenses, or both.

MR. QUINTON: Your Honor, I am going to object to the witness reading from something, unless we can know what he is reading from, and whether it's a quote.

MR. GERRY: You have a copy of it, Mr. Quinton.

THE COURT: Address it to me, Mr. Gerry.

You have foundation, and I assume this would obviate your original notice requirement if you can lay a foundation relative to his testimony here.

You may continue his inquiry, sir.

MR. QUINTON: May my objection be noted to reading from some record without citing it to us, your Honor?

THE COURT: I think he has. I think he was asked [12] specifically what he was reading from at the very onset of his testimony.

Isn't that correct, Mr. Gerry?

MR. GERRY: My understanding, your Honor, is that he is refreshing his recollection from excerpts from the FAA Historical Fact Book. Those excerpts are those that are in-

cluded in our request for judicial notice; and my understanding is that Mr. Quinton already has a copy of those.

THE COURT: All right.

Thank you, sir. You may continue your examination, and the objection may be noted and overruled.

You may inquire.

MR. GERRY: Thank you, your Honor.

BY MR. GERRY:

Q Had you completed your answer, Mr. Holladay?

A I don't recall if I had, or what the question was.

Q All right. Pursuant, then, to that Act, the Air Commerce Act of 1926, the Government did commence the certification of airmen and mechanics, did it?

A Yes, sir.

Q And then, at some later time, did the Government begin the certification of new aircraft?

A Yes.

Q When was that, sir?

A In 1927, specifically March twenty-ninth, the Federal Government [13] issued its first aircraft Type Certificate Number One.

Q Prior to March 29, 1927, had there been a number of different kinds of aircraft which had been manufactured and were being flown both privately and in commerce in the United States?

A Yes, sir.

Q And were those licensed and certificated by private parties, prior to that time?

A Yes, in the sense that there was no licensing or certification process; but they were performed, what would amount to that.

Q So that prior to that time, then, even for new aircraft, all inspections, modifications—all inspections were private?

A That is correct.

Q Then, at a subsequent time, in about 1930, did the Government pass regulations for aircraft components and accessories?

A Yes, sir, on December thirty-first.

Q And, at a later time, also, did the Government then begin to pass regulations involving the alteration and repair of licened aircraft?

A Yes, sir. That took place on January first, 1931.

Q Prior to the time of the passage of those regulations [14] by the Government, was all of the inspection, manufacture, repair, alteration, solely under the aegis of private parties?

A Yes, sir. Any person or organization who chose to do so, could do whatever they pleased in respect to aircraft, or their operation.

Q And is that similar to these tower operations in the United States?

A Yes. At this time, to the extent to which airports existed, and/or to the degree which they were equipped with towers, the towers were operated by private parties or organizations.

Q When did that change, as to the tower operations?

A That changed in November—became effective in November of 1941.

The procedures for the Federal Government's operation of control towers was first established on October seventeenth, 1941; but they did not take over the operation of towers until November first, 1941; and by November fifteenth of 1944, there were eight control towers that were then under the Civil Aeronautics Administration's operational responsibility.

Q Now, is there, then, a similarity of the Government taking over the duties of the control towers and taking over the duties of the inspection and licensing of aircraft?

MR. QUINTON: May I object to this question? It's [15] leading and calls for a conclusion from this witness, your Honor.

THE COURT: No. I will overrule the objection.

You can answer that, sir.

THE WITNESS: Yes, there is. It was a process by which the Government gradually and progresively began to preempt private persons in the same areas of activity.

BY MR. GERRY:

Q After the Government had taken over the inspection of new aircraft and of the alteration and modification of air-

craft, did this relieve the repair stations and mechanics of their duty to inspect aircraft which they had altered, modified or repaired?

A No, sir.

Q They continued to have such a duty, as defined by the FARs?

A Yes, sir, they did.

Q Did the Government in fact license persons to inspect aircraft?

A Yes, they did. They certificated not only the mechanics who had performed the actual, physical work of maintenance, inspection, repair or modification, but they also certificated and delegated authority to other persons who would perform responsibilities for inspection, and designated those persons to act for the administrator.

[16] And those persons then would inspect modifications and repairs, would they?

A That is correct.

Q The—assume, sir, that an item had been licensed by the Government—an aircraft had been licensed by the Government and had been placed on the market by the manufacturer as a new aircraft; in purchasing that aircraft, as an aircraft purchaser, what would the purchaser look for to determine whether or not the aircraft was airworthy?

MR. QUINTON: I am going to object to the question, your Honor, as calling for speculation.

THE COURT: Sustain the objection, as calling for a conclusion.

MR. QUINTON: I am going to object to the question again, based on materiality because the certification process for new aircraft is not at issue here.

THE COURT: I will overrule your objection on materiality.

You may rephrase your question, sir.

BY MR. GERRY:

Q In purchasing an aircraft, Mr. Holladay, a new aircraft that has not previously been modified or altered, to what would the purchaser look?

MR. QUINTON: Again, objection, because it calls for speculation from this witness. There is no way he can know

what any individual might rely on at the time he buys an [17] airplane.

THE COURT: I think he is sufficiently qualified. You may inquire on cross-examination. He can list those factors which he feels may be appropriate.

You may inquire.

You can answer the question, sir, if you understand it.

THE WITNESS: Yes, sir, I understand it.

The person would look to one single primary document, which would have to be on board that aircraft in order for him to be able to operate it in the category for which it was certificated; and that would be the certificate of airworthiness.

BY MR. GERRY:

Q Is that required to be aboard every aircraft at any time that it's operated, from the time that it's new until the time that it goes out of service?

A Yes, sir.

Q And does the person purchasing that aircraft, from the manufacturer now, have a right to rely on that certificate as proof of the airworthiness of that aircraft?

MR. QUINTON: Objection there, your Honor. Calls for a legal conclusion.

THE COURT: I think it probably does, Mr. Gerry. You have other testimony that already speaks to this area. Am I [18] correct?

MR. GERRY: Well, I did, your Honor, except it calls for a factual conclusion, as a practical matter.

Q (By Mr. Gerry:) The—do the pilots, or the persons purchasing the aircraft, rely on that document as proof of the airworthiness of the aircraft?

MR. QUINTON: That is a different question. What he asked was whether he had a right to rely on it.

THE COURT: You are not objecting to the second question?

MR. QUINTON: The second question calls for speculation as to whether any pilot might or might not rely on the documents.

THE COURT: I will overrule that objection.

You can answer that, sir, if you understand it.



THE WITNESS: Yes. The pilot, among others, does in fact rely upon the certificate of airworthiness as indicating that the aircraft is airworthy.

In fact, the Code of Federal Regulations, 14 CFR, Part 91, speaks to that very same question.

BY MR. GERRY:

Q And, now, after that aircraft has come out, been purchased the first time around, are there provisions for altering and modifying that aircraft?

A Yes, sir.

Q Were there such provisions prior to the 1931 date [19] of January 1, 1931, when the Government provided for regulations for alteration and modification?

A No, sir.

Q By that, at least, since 1949, have there been such regulations?

A Yes, sir.

Q And, in order to make a major modification or alteration of an aircraft, what is necessary, sir?

(Pause.)

What's the document called?

A First, it is necessary for the person to be aware of and familiar with the Code of Federal Regulations, specifically 14 CFR, Part 21, because that spells out the basic minimum standard of regulations by which that individual must abide, and with which he must comply.

He then must complete the required procedure under the manner and the form prescribed by the Administrator of the Federal Aviation Administration. And that is regulated by the Federal Aviation Administration; and those procedures are carried out in accordance with a manual which is published by the Federal Aviation Administration and provided to its employees in the field, for their use in assuring that the persons seeking such modifications are, in fact, complying with all of the regulations as well as with all of those administrative and inspection procedures which the FAA requires.

[20] Q And if they do then issue such a document, is that the document called a Supplemental Type Certificate?

A Yes, sir.

Q Does the Supplemental Type Certificate,, which is issued, accompany the aircraft?

A Not the actual certificate itself, no.

Q Is there another piece of paperwork, then, that does accompany the aircraft?

A Yes, sir.

Q What is that called?

A It is called an FAA Form 337.

Q Is that as an alteration and repair form?

A Yes, sir.

Q Does that alteration and repair form have to refer back to the Supplemental Type Certificate which authorized that alteration and repair?

A Yes, sir, it does.

Q Can any private party issue such a Supplemental Type Certificate without the approval of the Government?

A No, sir.

Q Has the Government totally preempted, then, the field of the issuance of such a document?

A Yes, it has.

Q And the—in order for such an alteration to an aircraft, does the Government then have to, under their own [21] regulations, review and accept the design of the proposed change or alteration?

A Yes, sir. That must be done before the proposed change or alteration can begin.

Q Okay. Now, when you say that, that's—normally, when you have an alteration or modification, you might be altering or modifying or agreeing to the alteration or modification of a great number of aircraft. Is that right?

A That is correct.

Q Is there a second way to do it, if you are modifying only one aircraft?

A Yes, sir.

Q Now, in the first way to do it, is it necessary to present detailed design specifications, data, and drawings?

A Yes, sir.

Q And, before any work is done on the aircraft, then, as I understand it, those are presented to the FAA. The FAA

reviews and approves; and then, only then, does the work of change take place. Is that right?

A That is correct.

Q Now, directing our attention, instead, to the second method, for the one aircraft modification, is that specifically provided for in the regulations; and also in the manual that is provided for the FAA?

A Yes, sir, it is.

[22] Q And is that manual that is provided by the Government known as the "Handbook 8110.4, Type Certification, Department of Transportation, Federal Aviation Administration"?

A Yes, sir, it is.

Q And—

(Pause.)

MR. QUINTON: Was there a date on that publication?

THE COURT: If there is, if you can assist Counsel, I would appreciate it.

MR. GERRY: Yes, December 28, 1967.

THE COURT: All right.

You may continue, sir.

BY MR. GERRY:

Q Does that handbook set forth a method by which you can certify, without presenting the entire data?

MR. QUINTON: Your Honor, I am going to object to this testimony as based on this handbook because the date of that was subsequent to the date of the inspection.

MR. GERRY: Withdraw the question.

Q. (By Mr. Gerry:) Does that handbook set out the system by which a single engine—I mean a single airplane modification may be done—

MR. QUINTON: Well—

MR. GERRY:—and—

THE COURT: Let him finish the question, Mr. Quinton, or [23] it's going to be a hard day for all of us.

MR. QUINTON: I thought you had finished, Mr. Gerry.

THE COURT: Go ahead, Mr. Gerry.

BY MR. GERRY:

Q And is that handbook merely a statement of the practice, custom and procedure, which pertained prior to the date of its publication?

MR. QUINTON: I am going to object to this as being—any line of questions from this handbook, your Honor—as being immaterial to our cross-examination, because it wasn't effective on the date of certification that we are concerned here.

THE COURT: Your objection is noted and overruled. The question doesn't pertain to that.

If you understand the question, sir, you can answer it.

THE WITNESS: Yes, sir. May I hear the question, sir?

THE COURT: What he is asking you is: the thing you just alluded to, the handbook of 1967, if that incorporates practices and customs which existed prior to that time, sir.

THE WITNESS: Yes, sir.

THE COURT: You may inquire.

BY MR. GERRY:

Q Is it a new document or revision of or correlation of old documents that incorporated the same information prior to 1967?

[24] A It is.

MR. QUINTON: Objection, your Honor. If we have the other document, we can present them.

THE COURT: Well, Mr. Quinton, you can cross-examine. If you ascertain that he doesn't know what he is talking about or he hasn't considered other documents, or you have regulations which were applicable which he says were not, I would be delighted to hear it. That's the purpose of cross.

You may inquire.

The answer may stand.

BY MR. GERRY:

Q What procedure was followed in the modification of single-engine aircraft in the custom and practice in 1965, as outlined in the handbook?

A I think you misspoke yourself.

Q No.

A Single-engine airplanes.

Q I mean single-engine airplane modification.

A The procedure which applied then was that, if it was going to be for only one aircraft, it is not necessary to submit all the voluminous data, including detailed specifications; but they could, instead, submit marked photographs,

sketches, or a word description, but if they did that, they would have to assure that it would be put on one aircraft only; and, under those circumstances, there was a statement which [25] would be required on the FAA form for that particular kind of STC, which would apply limitations and conditions to that STC.

THE COURT: When you say "STC," you are talking Supplemental Type Certificate?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. GERRY:

Q Did the procedure require, in the single aircraft modification, done pursuant to this other procedure, did it require an actual inspection by an FAA representative?

A Yes, sir, it did.

Q And was that called a compliance inspection?

A Yes, sir. It was called a compliance inspection; and it involved the physical inspection of the prototype modification to determine compliance with the Federal Aviation Regulations, or Civil Aviation Regulations requirements; and it went further to state, and I quote, "These inspections will be conducted by an FAA representative," unquote.

MR. QUINTON: Excuse me, your Honor. When the witness is reading something from the document, could we know what page he is reading from?

MR. GERRY: Page 30, item 43B(1).

THE COURT: In the future, sir, if you do read, if you could give us the page and line reference so counsel may follow.

[26] You may inquire.

THE WITNESS: Yes, sir.

MR. GERRY: Thank you, your Honor.

BY MR. GERRY:

Q Then, following the inspection, if the Government inspector finds that the installation, as installed—is this an "as installed inspection"?

A Yes, sir, it is.

Q It has to be completed, then?

A Yes, sir. The words that are used are from page 30, paragraph 43B(1), "Physical inspection."

Q All right. Then, assuming that the FAA finds that the modification meets FAA standards, is the application entitled to the issuance of a Supplemental Type Certificate?

A Yes, sir.

Q And if the FAA finds that the installation does not meet Government standards, is the applicant entitled to the issuance of a Supplemental Type Certificate?

A No, sir.

Q May a repair station, mechanic, or any other person, legally install a gasoline-fired heater in an aircraft, not certified for such aircraft, initially, without the obtaining of a Supplemental Type Certificate?

(Pause.)

Q Let me rephrase. Must anyone wishing to install a [27] gasoline-fired heater in an aircraft not previously certified for such heater, must they obtain a Supplemental Type Certificate in order to do so?

A Yes, sir.

Q Is the aircraft, by definition, unairworthy if such a heater were installed without the Supplemental Type Certificate?

A Yes, sir. In the sense of the existing certificate of airworthiness and the category for which that particular aircraft is certificated.

Q All right. Is each of the persons who flies that aircraft charged by the Federal Air Regulations with the duty of determining that there have been no illegal installations put aboard the aircraft?

A Yes, sir.

Q Are each of the persons who inspect that aircraft, pursuant to hundred-hour inspections or annual inspections, charged with the duty, by the Federal Air Regulations, of determining that there have been no illegal installations put aboard that aircraft?

A Yes, sir.

Q How do they determine that?

A By the process of maintenance, which, by definition, and the regulations, includes inspection; and by compliance with the regulations which outline the responsibilities of [28] those persons performing maintenance; and specifically by examination of what is known as the paperwork, which must be completed and either carried on board or available

for examination along with the aircraft when it is undergoing the maintenance inspection process.

Q Assuming, sir, that a mechanic was inspecting an aircraft which did not have, on its original certificate, the gasoline-fired heater, did not have a Supplemental Type Certificate, or a Form 337 for such a heater, and he discovered that, could that mechanic sign off that aircraft as airworthy, following his inspection?

A No, sir, he could not. There are regulations which spell out in detail what he must do, which is to basically follow the procedure prescribed, which is spelled out by paragraph, and even includes a recommended series of words that can be inserted in the logbook; to wit, that he has in fact inspected the aircraft; but that it is not airworthy; or, if it is airworthy, that he has inspected it and it is airworthy; and, in the event of such a situation as you concluded in your question existing, he would, of course, have to indicate that it is not airworthy; and he is required to place in the hands of the owner or operator of the aircraft, the statement to the effect of its unairworthy condition and the reasons why he will not sign it off.

Q So that, then, the owner or the operator of the [29] aircraft, when he is handed a document, either in the logbook or separately, which is signed by an authorized airworthy—aviation inspector, do each of them have a number?

A Yes, sir, certificate numbers.

Q And when he signs that logbook, does he have to also put down his log number?

A Yes, sir, he does; and if it is an inspection which requires the authorized inspector, who is a designee of the Federal Aviation Administration, he must preface—correction—prefix the number by his "AI," which means he is an authorized inspector.

Q When he hands that document, then, to the owner or operator of the aircraft, as a matter of custom and practice in the industry, does the owner or operator of the aircraft then redo the inspection to determine that that is the truth, or does he rely on that document?

MR. QUINTON: I am going to object, again, your Honor, as calling for speculation from this witness as to what anyone may rely on any given instance.



He can testify as a matter of custom and practice, but I don't think he can testify as to what one person might rely on.

THE COURT: It's a good objection, Mr. Gerry.

You might rephrase your question.

Q (By Mr. Gerry:) Do owners and operators of [30] aircraft, as a custom and practice in the industry, rely on those documents, signed by the AI, stating that the aircraft is airworthy?

MR. QUINTON: I am going to object again, your Honor, as calling for a conclusion.

THE COURT: I will overrule the objection.

THE WITNESS: My answer is, "Yes."

BY MR. GERRY:

Q If an owner or operator of an aircraft were instead handed a document in which the AI had stated that the aircraft was unairworthy, could the owner or operator of that aircraft fly that aircraft legally?

A No, sir.

Q Would he jeopardize all of his licenses issued by the Government if he did fly that aircraft without such an airworthiness approval by the AI?

A Yes, sir, unless he complied with other provisions in the regulations, such as obtaining a permit to move it to some other station. If he did not obtain that and he flew the aircraft, he would be in violation of numerous regulations, and his certificate would be in jeopardy. He would also be subject to fine.

Q I believe that you—are there airworthiness directives that are put out by the Federal Aviation Agency?

A Yes, sir.

[31] Q Do those require repairs or changes or modifications to aircraft?

A Yes, sir, they do.

Airworthiness directives are issued under 14 CFR 39, and they are safety airworthiness directives that require repairs, modifications, inspections, maintenance, either on a one-time basis, or on a continual basis.

Q When an aircraft is turned over to an aircraft mechanic or repair station, does the mechanic, or the repair station, have the duty, under the FARs, to check that air-

craft against the airworthy directives issued by the FAA for that aircraft?

A Yes, sir, he does.

Q May he return that aircraft to service without compliance with the Federal airworthiness directives?

A No, sir, he cannot; and if he did, he would find himself in the same jeopardy as the pilot, in answer to your previous question.

Q Does he, when he complies with the airworthiness directive, or any of them, must he make a note of that in the logbook of the aircraft or the engine?

A The engine logbook, you mean?

Q Yes, sir.

A Yes, sir, he must. He must use the back pages of either one of those logbooks, depending upon which is [32] applicable to airworthiness directives, and indicate the number of airworthiness directive, the date of compliance and the extent of compliance; that is, if it is a one-time, what he did; if it is a continual compliance, the number of hours at which he complied; and, at most case, the custom and practices to indicate when it is again due.

Q Now, I would like you to assume, sir, that an aircraft has been in service for many years and there have been several airworthiness directives issued by the Federal Government relative to that aircraft and/or its engines; and this aircraft is now turned over to a repair station for a—an inspection.

Does the repair station have to look at the airworthiness directives and then inspect the aircraft to determine that each and every one of those airworthiness directives have been complied with, or is there another system that is used?

MR. QUINTON: Well, excuse me, your Honor. Maybe I am missing something here, but I see no materiality to airworthiness directives in this evidence that we are talking about.

MR. GERRY: I will connect it up, your Honor.

THE COURT: If you understand it, you can answer it.

THE WITNESS: Yes, sir; and there is a system by which this must be done. The person conducting the maintenance [33] and inspection examines the paperwork, including the law books to which he previously referred; and

determines the extent of compliance, compared with the list of airworthiness directives which he knows are applicable to that aircraft.

If compliance has already been indicated in the logbook, and if no further compliance is required, then there is no responsibility for the person doing the maintenance or inspection to look at each one of those airworthiness directives in terms of its compliance.

BY MR. GERRY:

Q He can rely on the paperwork, then?

A That is correct. If, however, it is an airworthiness directive that requires a continuing inspection, such as every five hundred hours, then he must determine whether or not, at that particular time interval, that five hundred hour continuous inspection is a requirement; and if it is, he must comply.

Q Besides the logbooks that are carried on the aircraft, or available for the inspections, is it required that any 337s be available at the same time?

A Yes, sir, it is.

Q And are those treated in the same fashion as the airworthiness directives?

A Yes, they are.

Q So that, if there is a 337 on the aircraft for the [34] installation of a nose heater, gas-fired nose heater in the aircraft, is the repair station or mechanic, or inspector, required to recheck that aircraft to determine that, in fact, the installation was done and was done in an airworthiness manner?

A No, sir. He is only required to maintain it in respect to its inspection and examination; but he is not required, nor is he authorized, to make any changes in that installation beyond that which is installed.

Q Would it be economically feasible, sir, to do it any other way than to rely on the paperwork, rather than reinspecting every hundred hours each and every airworthiness directive, 337 or other?

MR. QUINTON: Other?

I am going to object to the question, your Honor, as being totally outside the area—

MR. GERRY: I will withdraw the question.

THE COURT: Go ahead, sir.

BY MR. GERRY:

Q What would be the economic impact upon owners and operators of aircraft to require a system whereby each time the aircraft was in for hundred-hour inspection, each airworthiness directive and modification and alteration had to be completely reviewed and inspected on the aircraft itself instead of on the paperwork?

[35] A It would be an unbearable economic burden and there would be very, very little utilization of the aircraft, because it would spend most of its life in a maintenance facility undergoing inspection and repetitive reinspections of already installed items of equipment.

Q Do you fly aircraft as a pilot?

A Yes, sir.

Q Do you review the logbook when you get in an unfamiliar aircraft?

A When the logbooks are available, yes.

Q And when—do you determine, before you fly, that there is an airworthiness certificate aboard the aircraft?

A Yes, sir.

Q And that it is up to date?

A Yes, sir.

Q They expire periodically if inspection procedures are not complied with, do they not?

A Yes, they do.

Q And, if the airworthiness certificate—strike that.

If the inspection procedures have not been complied with, and you fly that aircraft, are your licenses in jeopardy?

A Yes, they are.

Q And, if that is signed off that they have been complied with, do you rely on that as being evidence of the airworthiness of the aircraft?

[36] A Yes, sir.

Q Does that apply also to the logbook entries as to the ADs, compliance with the ADs, at the 337 alteration forms?

Do you also fly on commercial aircraft?

A Yes, sir.

Q When you fly on commercial aircraft, sir, you don't ever see the paperwork on that aircraft, do you?

A No, sir.

Q It is required that the airworthiness certificate be placed in a place visible to passengers?

A Yes, sir.

Q Did you ever bother to look at that?

A No, sir.

Q What do you do as an air traveler?

A I rely on the fact that the aircraft that are used in commerce in the United States are certificated by the Federal Aviation Administration, through their regulatory procedures, as a matter of what I know to be the law, specifically the Federal Aviation Act of 1958. I, with certain exclusions, which are within my peculiar area of knowledge, choose certain aircraft that I will fly on against the others which I will not fly on; but I think, in that respect, I am unique as a passenger.

Q Those that you will fly on, you believe that [37] everybody has done their job?

A Yes, sir.

Q And you rely on that?

A Yes, sir, I do.

MR. GERRY: No further questions.

THE COURT: How much time do you think will be involved in your examination, Mr. Quinton, just a best estimate, sir?

MR. QUINTON: I don't think it's going to be nearly as long as the direct, your Honor, but probably twenty, twenty-five, thirty minutes.

THE COURT: This might be an appropriate time to take our lunch recess.

Give me some insight, if you would, gentlemen.

Thank you, Mr. Holladay. You may step down at this time, sir.

What else do you envision relative to time, Mr. Gerry, relative to your presentation today?

MR. GERRY: I would only have redirect, your Honor, of Mr. Holladay, and I wouldn't expect that to go very long, because I don't expect Mr. Quinton to go very long.

THE COURT: And then, as far as the time estimate, relative to your comments, I assume we can finalize the resolution of this matter today.

MR. GERRY: I would hope so, your Honor. I would think ten, fifteen minutes.

[38] THE COURT: Mr. Quinton, what is your view?

MR. QUINTON: I think that is fair, your Honor, another ten or fifteen minutes to argue. I don't know if the Court would like to have briefs or not.

THE COURT: No. I have reviewed all the material, and I would welcome Counsel's comments after the evidence has been concluded.

If, gentlemen, one-thirty is a convenient time for all counsel, we'll be in recess, then, until one-thirty.

Thank you very much.

MR. GERRY: Thank you, your Honor.

(Luncheon recess.)

[39] SAN DIEGO, CALIFORNIA, FRIDAY, SEPTEMBER  
19, 1980, 1:30 P.M.

—0—

THE COURT: Good afternoon, ladies and gentlemen. The Court would note the presence of all counsel. The witness has resumed the stand.

You may inquire, Mr. Quinton.

MR. QUINTON: Thank you, your Honor.

First of all, your Honor, I would move to strike Mr. Holladay's testimony on direct for the reason that I don't believe his testimony is material to the—any of the inquiries in any of the mandates imposed upon the Court by the Court of Appeals and the *United Scottish Insurance* opinion.

THE COURT: All right, sir.

That motion will be noted and would be denied.

You may proceed, sir.

MR. QUINTON: Thank you, your Honor.

#### CROSS-EXAMINATION

BY MR. QUINTON:

Q Mr. Holladay, you testified on direct, I believe, that the installer of the heater, or the installer of any piece of equipment on an airplane, has a duty or obligation to inspect that installation or that piece of equipment after it is

installed, and to insure that that installation is airworthy. Isn't that correct?

[40] A Yes, sir.

Q And it is your testimony, I believe, that the inspection by the FAA does not relieve the installer of that obligation to inspect the heater and to insure that it's airworthy?

A That is correct.

Q And you further testified that this obligation to—and—the obligation to inspect any installation of any piece of equipment on an airplane existed even prior to the existence of the FAA, or the CAA, as predecessor agent?

A The obligation, as a moral responsibility, existed; but there was no obligation by regulation prior to that time.

Q Is it your understanding, sir, of the certification process, in general, that the certification process is a type of regulation of the aviation industry imposed on it by the FAA?

A I am not sure how you are using the word, but the criteria for certification, at least as to minimum standards, are contained in the regulations; so, to the extent to which you use that word in that manner, then, certification is regulated. I don't know if I understood your question, or if that constitutes an answer.

Q Well, let me rephrase the question, sir.

Is certification, as performed by the FAA, a regulatory activity when it's performed subject—when it subjects [41] the industry to certification of an aircraft or of equipment?

A Well, I can only answer from the point of view of how I look at it. It seeks a legal opinion; I am not qualified to answer that. I consider it to be a regulatory activity. I consider the FAA to be a regulatory agency.

MR. QUINTON: I have no further questions, Mr. Holladay.

THE COURT: All right.

Anything further of this witness, sir?

MR. GERRY: I have nothing further, your Honor.

THE COURT: May he then be excused, gentlemen?

MR. GERRY: Yes, your Honor.

MR. MILLER: Yes, your Honor.



THE COURET: Thank you, sir. You may step down and you may be excused.

All right. Anything further on behalf of the plaintiffs at this time?

MR. GERRY: Not for the plaintiffs, your Honor.

THE COURT: Anything on behalf of the defendant?

MR. QUINTON: No, your Honor. I have—since the plaintiff has rested, I would move to dismiss this action under Rule 41B. I believe that procedurally would be the appropriate motion at this time.

THE COURT: I don't know that that's the appropriate motion. It's remanded back for evidence. It may have that as its ultimate resolution, but your motion will be noted, and I [42] will—it will stand submitted, sir.

I would be happy to hear argument of counsel relative to the remand and the issues raised by the remand. I will take under submission your Rule 41B motion.

MR. QUINTON: The defendant has no evidence to offer, your Honor, procedurally, and—

THE COURT: All right.

The evidence having been concluded, gentlemen, having in mind the nature of the remand and the limited issues pertaining thereto, I would welcome your comments, Mr. Gerry; and it would be involving specifically the issues on the remand.

READING OF DEPOSITION OF  
CHARLES H. MCMILLAN  
JANUARY 30, 1975

[415] MR. MILLER: Your Honor, our next witness, again by deposition, would be Charles H. McMillan, and I would comment that Mr. McMillan died shortly after the giving of this deposition, and Judge Hill in Dallas ordered that it be received in evidence, although it has not been signed.

THE COURT: Any objection to the reading of this deposition, sir?

MR. COOK: No, your Honor. We have no objection, your Honor.

THE COURT: You may proceed.

MR. MILLER: This is the deposition, taken in Dallas. Appearances were Greer, Popko, Miller & Foerster, by James H. Miller for Mrs. Cearley, and Charles Cearley, and Karen Cearley; Herbert Lyons for the United States Government; and other Counsel were there for Air Wisconsin and for Aerodyne.

Deposition was taken on February 5, 1973. Direct examination is on Page 4, Line 8 (Reading:)

"Q Mr. McMillan, would you give your full name to the reporter?

"A Charles H. McMillan.

[416] "Q And what is your current address?

"A 6728 Victoria, Falls Church. It's really Forth Worth, 76118.

"Q Have you ever had your deposition taken before?

"A This is the first time I have ever been on this side of a deposition. I have been in quite a few on the other.

"Q And what do you mean, 'on the other'; you mean you have taken depositions yourself?

"A Not taken them, but participating in them.

"Q Did you have a chance to talk over the deposition with an attorney for the United States?

"A No.

"Q Well, you understand that we are making a copy—the reporter will make a copy of your testimony today, and you will have a chance to examine it and make any changes that you want to, and also, any of the attorneys would have the right to make comments on any changes that might be made?

"A Standard procedure, as I understand it.

"Q And of course you are testifying under oath, with the same obligations to tell the truth as if you were in a court of law; you understand?

"A Very definitely, I do.

[417] "Q What is your current occupation?

"A I'm retired.

"Q And when was your last occupation before retiring?

"A Assistant Chief, Engineering-Manufacturing Branch, FAA, in Fort Worth.

"Q How long were you employed by the FAA?

"A 26 years.

"Q Now, starting with your last employment, what were your job titles during those 26 years?

"A Well, I was a manufacturing inspector, District Office Supervisor, manufacturing inspections specialist, and then I came out as Chief of the Manufacturing Inspections Section in Fort Worth, and from there I went into Assistant Chief of the branch.

"Q Calling your attention to Plaintiffs' 4 in the deposition of Mr. Coppinger, which is a copy of the supplemental type certificate, does your signature appear on this document?

"A Yes, sir, and I don't think anybody could duplicate it."

THE COURT: May I inquire if the questions are now being propounded by what attorney?

MR. MILLER: By myself, your Honor.

[418] THE COURT: Fine; thank you.

MR. MILLER (Reading):

"Q I'll agree with that.

Could we get a photocopy of this and make it Plaintiffs' 1 on this deposition?

Now, this document is dated—I believe on down here it appears 8-4-75, and then revised—" '65; I'm sorry, "—and then revised 10-1-65; is that correct?

"A Yes.

"Q What was your job title with the FAA at this time?

"A Assistant Chief of Engineering-Manufacturing Branch.

"Q And what were your responsibilities as part of this job?

"A Generally, supervision of the five sections, and the engineering service representative offices. I also handled the clerk situation, as far as the branch office was concerned.

"Q Well, now, in connection with the granting of supplemental type certificates, would your duties include work in that area?

"A Well, yes and no. Direct participation in the engineering evaluation, no; coordination of the resulting data that came from this activity, in the [419] absence of the branch chief, I would sign off the supplemental type certificates, if I found that they met all of the criteria that had been established as far as the branch office was concerned.

"Q Would you be the final person to examine the certificate before it was granted?

"A The certificates? Well, sure, you examine them because you sign them.

"Q But in other words, you were the final level of review within the FAA for this type of certificate?

"A When those came into the branch office, they came in for just one thing, and that was for checking to make sure that everything had been done as far as the records were concerned, and for signature. The engineering evaluations, or the technical evaluations that led to the individual sections recommending to the branch office issuance of such a document, came under the chiefs of these five sections, and in accordance with the standard agency procedure, and knowing our people, we had no compunctions about signing

such a certificate, providing our review showed them to be all right.

"Q When you say, 'your review,' what specifically did your—

"A We would have a copy of signatures of all of [420] the section chiefs that were involved in the evaluation of these modifications. it could be one, two, or all five, and it could also be the engineering service representatives, which came under the supervision of the branch office.

"Q Now, do I understand your answer that you would receive an engineering evaluation from either one of the heads—

"A Well, if we had a question, we would ask for the data, but this would be something that was definitely unusual. In most cases, it was received by the sections, portioned out to whichever section was responsible for the type of activity depicted in the data, presented for approval, and on receiving an assurance from them that they had reviewed it and found that it contained the appropriate regulations, that was all we needed.

"Q Well, how would they indicate to you that this had been done? What type of documentation would you receive?

"A Generally, it was a sign-off sheet, or there were other times where we would meet, that is, all of the sections involved as far as the particular project was concerned. We would get their approval.

"Q Would this be verbal?

[421] "A Generally, it was accompanied by minutes, but the meeting, as far as it was concerned, was verbal.

"Q Now, if there were such sign-off sheets, would they be retained in the file of the supplemental type certificate?

"A If there were sign-off sheets, they would be part of the package of the project.

"Q Now, would the sign-off sheets indicate the individual who had made the actual engineering evaluations?

"A The only time that we would get an indication as to who the engineer was, would be when the sign-off was done by the engineering service representative. When there were several sections involved, no, we would get the sign-off from the Section Chief himself because, generally, with-

in his own group, he had a certain amount of coordination that he had to do, generally with one or more of his people—generally more.,

"Q Well, in the FAA file on supplemental type certificates such as the one that is plaintiffs' 1 in your deposition, what type of document would exist in that file that would contain the names of the persons who had either made or signed off for the engineering evaluation?

"A As part of the file package, you will have [422] correspondence, so you would know who the engineer was that worked on the particular project. I mean, as far as the type of data itself, it would tell you their particular engineering specialty, and you would have all of the data, so you knew what the modifications are, the work that was involved, or what the approval covered.

"Q And would all this material remain in the file after the issuance of the certificate?

"A Oh, yes; there is one of two places where it's kept. I mean, the file is kept in the regional office, and otherwise, we would send it to your office.

"Q But the file would permanently be maintained of this material?

"A We are required by Federal procedure to maintain it.

"Q I mean, is there any regular procedure by which any of this material would be removed from the file?

"MR. LYONS: Are you referring to the archives, active or inactive?

"Q BY MR. MILLER: Any procedure that he was aware of.

"A The only thing I can tell you is as long as there is one of those machines still certificated and [423] operating, all data that pertains to that particular make or model will be retained. When there appears to be none left, it's up to the archives. I don't know what they do. I'm not that familiar with it.

"Q As long as one of these planes were certificated to fly, there should be a complete record?

"A There should be an adequate record to maintain it in an airworthy condition.

"Q Well, would there also be a complete record of the paper work that went into this FAA approval and granting of a supplemental certificate?

"A Yes.

"Q So that should all be in the file?

"A It should be all in the files.

"Q Do you recall the granting of this particular supplemental type certificate?

"A Well, now, we are talking about eight years, and the answer is no, I don't.

"Q Do you recall having any conversation or discussion with anyone concerning this supplemental type certificate, at any time?

"A No, what I have told you earlier—I mean it's basic operating procedure, as far as the agency was concerned, while I was with them. I have been retired for over five years, so what it is now, I cannot tell [424] you.

"Q Now, concerning this particular type of change involving the installation of a heater, a gasoline-fed heater, what type of engineering evaluation would you have required before you signed off this type of supplemental type certificate?

"A Well, if this is the technical data, I can assure you of one thing—excuse me just a second—

"Q The witness is referring to Plaintiffs' 1 of Mr. Hill's deposition, which is the eight pages of drawings and photographs.

"A Now, I'm sure—when I say, 'sure,' I can't remember, but I know the procedure at that particular time with pictures, and that's about all we have got, that the appropriate engineer and inspector assigned to the project would have given that a good, confirmative inspection as far as compliance. Now, by, 'conformant,' or, 'conformant inspection,' I'm talking about conformity with the Civil Air Regulations applicable to such activity at this particular time.

"Q Now, when you say, 'a conformance inspection,' does that mean inspection of the actual installation?

"A Inspection of the actual installation for compliance with the airworthiness requirements of the FAA.



[425] "Q Would they have also examined the drawings for similar compliance with the airworthiness standards?

"A If you have drawings.

"Q Well, I'm talking about describing this collection of pictures with information concerning type of material used.

"A Well, I see a bunch of photographs here that shows a few things, but to me it does not constitute drawings, or anything nearly approximating that. It does give us a record as to what certain installations involved were, and this, supplemented by the airworthiness inspections or conformance inspections of FAA personnel, which is done at times with photographs, and the conformity inspection, or compliance inspection by appropriate personnel—those assigned the duties of evaluating the heater systems, and they are also responsible for ventilation requirements—if the activity is quite complex, then we use a systems engineer. If the activity is one aircraft, and the modification is quite slight, then generally we will send the service engineer out.

"Q Well, now, in examining these photographs with information on the side, would your people go through and, for example, where it says, 'Hot air plant,'—sets out certain types of materials to be used—would [426] they examine that, and say, 'Yes, that is the correct material'?

"MR. LYONS: I think—"

Well, that question was reasked, your Honor, so delete that material down to Page 14, Line 19 (Reading:)

"Q BY MR. MILLER: Is it correct that the procedure that you have been describing, and the type of examination, is the type that you would have required as a matter of course in doing your job before you affixed your signature to this STC?

"A I think I know what you are asking for. Let's put it this way: If this kind of data had been presented to the FAA engineer and inspector, they would have had to make their compliance with the regulations and inspections, yes.

"Q And would you have demanded to see evidence of this compliance before you signed off the STC?

"A This is something that is delegated to the section chief, the responsibility of making sure that this particular activity is done. I could not have monitored and carried on

the normal activities of the branch because there was some 80 engineering and flight test personnel involved, and I couldn't get around to all of those.

"Q So you would not have monitored the actual [427] performance of this test personally?

"A I thought I had made clear, a little bit earlier during this deposition, that, yes, we had to have it before we would issue such a certificate.

"Q Well, it was clear to me, but I think there was an objection raised. So, in other words, as I understand it, your testimony is that the chain of command was such that you made the final sign-off, and before you would make that sign-off, you required from your section chiefs, written—

"A From the section chief of the participating sections of the project.

"Q All right. The section chiefs that participated in the particular STC, you required from them their assurance, or their indication to you, that this type of procedure which we have been discussing had been performed under their direction?

[428] "A We would assure ourselves, from them, that they had applied all of the regulations and found that the modifications did comply with the existing regulations that were in force at that time.

"Q All right. Now, in order to comply with those regulations at that time, would the inspection of the actual installation that you previously described be one of the requirements?

"A With this kind of data?

"Q Yes.

"A Definitely.

"Q All right. Have you had a chance to examine all of the drawings that are referenced on this STC?

"A No.

"Q Would you take a moment and just go through them? They are the documents that are specified on Plaintiffs' 1 to your deposition, are they not? There is a drawing No. D-205141?

"A Well, I'll call them drawings. Yeah, Sheet 1, okay.

"Q Now, with a submittal of this type, in requesting a supplemental type certificate—and I believe Plaintiffs' 1 does indicate that it is for two aircraft; is that correct?

"A That's what it says.

[429] "Q Well, assuming that these documents which are referred to here as drawings—which you feel, perhaps, should not be dignified by that designation, but which are the referred documents—

"A I think they should be appropriately identified, but that's beside the point.

"Q —assuming a submittal for a supplemental type certificate was made with those drawings, in accordance with the document, Plaintiffs' 1, would you have required from your section chief, or the section chiefs of areas relevant to this installation, an assurance that they had actually made an inspection of the aircraft?

"A Well, to be candidly honest with you, that was such an inborn and such a consistent demand upon the section chiefs that no, I didn't have to insist upon it. It was all done automatically, as part of the operating procedure.

"Q In other words, if you saw a section chief's signature saying, 'We have looked at this thing and approved it,' you would automatically assume that they had followed the normal procedure and had made such an inspection?

"A Well, I would like to go back and preface one other thing, and that is that we have learned to know [430] our section chiefs, what we could expect of them. As I said before, we had a good group. Yes, they could be depended upon. If the signature was there, that generally was all that was necessary.

"Q But under the normal procedures, section inspections—

"A It would have been done automatically. I mean, they understood operating procedures as well as we did.

"Q Now, calling your attention to a portion of Page 1 of 6, where it indicates—I believe it says, 'Heater fuel supply line is 3/16 O.D. times .035, WT, S/S,' which I assume is stainless steel, 'from heater fitting to blower pump part of heater,' and there is some more dimensions, and then it says, '.035 stainless to fuel supply in belly of aircraft.'

"A Uh-huh.

"Q Now, in the course of an inspection would the FAA personnel have inspected that line as well as the other portions?

"MR. LYONS: Objection; that's speculative again.

"Q BY MR. MILLER: Well, let me rephrase it: You have indicated that an inspection of this type of installation would be mandatory?

"A I would say that was the normal procedure; [431] right.

"Q Now, in the course of such an inspection, would it also be required or mandatory that the person examine all aspects of the installation?

"A Apparently we are not communicating. Number one, those boys that we had when I was there were quite knowledgeable as far as regulations were concerned. They were very thorough in their investigations. They may not be always able to give me all of the details, but they could always go back to the file and get it in case I needed such details. All of them that we had there had years in the course of regulations and had been doing an excellent job. Sure, I realize that people make mistakes at times, but the procedure that we had, I mean, generally, we would bring those to the front before we got to the end of the line, but it didn't happen often.

"Q Well, this particular portion of the installation that we are talking about is a gasoline fuel line; that the routing of gasoline fuel line inside an airplane is a matter of some concern from a safety point of view, is it not?

"MR. LYONS: I object to that. It's thoroughly speculative. You are asking for his opinion with regard to engineering, with regard to pilots. It's such [432] a broad question, I don't believe he can answer it.

"Q BY MR. MILLER: Mr. McMillan, in the course of your 26 years with the FAA, I believe you indicated that you eventually became the head of this particular section?

"A Assistant Chief.

"Q And before that, you had responsibilities such as the signing off of the certificates, which involved essentially reviewing the activities of all of the section chiefs; is that correct?

"A Well, after I became Assistant Branch Chief, yes, I had that responsibility, along with the Branch Chief, of approving these things where we found that they met the safety requirements established by the pertinent civil air regulations.

"Q And what was your assignment before that?

"A I was Chief of the Manufacturing Inspections Section.

"Q Did that involve inspecting the routing of such things as fuel lines in aircraft?

"A Well, my boys kept track of the manufacturers of aircraft, engines, and whatever else was produced for use in civil aviation, and, yes, we did conform to these. We determined compliance with pertinent regulations and everything else.

[433] "Q Well, calling your attention to Regulation 23.859—

"A Now, was 23.859 in force at the time that this was signed?

"Q I believe it was. Are you aware of whether or not the fact—that regulation was in force?

"A I think you will find that 18 was.

"Q Well, that is a regulation that deals with combustion heater fire protection, and there is a requirement, is there not, in connection with the installation of the combustion heater, that each applicable requirement concerning fuel tanks, lines, and exhaust systems must be met?

"MR. LYONS: I object again. You are making reference now to Part 23, or Part 18, or are you talking about the present time?

"THE WITNESS: Well, he could have been talking about Part 03, also, which was standard airworthiness requirements for non-transport-category aircraft.

"MR. LYONS: I renew my objection, then.

"Q BY MR. MILLER: Well, was such a regulation applied to a combustion heater installed under supplemental type certificates—

"A You are asking for me to remember over eight years. I would be inclined to say yes, but I cannot [434] tell you positively that there was, because I don't remember.

"Q Well, I'll ask you for the moment, as a hypothetical, to assume that such a regulation concerning the routing of fuel lines for combustion heaters was, in fact, in effect.

Would the inspection that you have indicated be standard and, in fact, mandatory in installations such as the one—would that inspection as to this stainless steel line to the fuel supply have to be made in accordance with those regulations?

"MR. LYONS: Objection

"MR. MILLER: Would you read the question back, please?"

It was read back and reviewed.

"Q BY MR. MILLER: You have indicated in your previous testimony that according to your general procedures, if you were dealing with STC such as the one we are discussing here, that it would be required—in fact, mandatory—to do an inspection of the aircraft; is that correct?

"A Right; as a general thing, that is where you are using this kind of data.

"Q Right.

"A Okay.

[435] "Q Now, assuming that there were regulations concerning the installation of fuel lines to combustion heater similar to 23.859, perhaps one of the antecedents of that regulation, the one that was in effect at the time of the granting of this STC, would—the inspection that you have previously indicated as a mandatory requirement had to apply to those regulations to the fuel line indicated on this drawing as .035 WT, S/S to fuel supply in belly of aircraft?

"MR. LYONS: I'm going to object again.

"MR. MILLER: Well, let the witness answer the question. I'm satisfied at this point.

"MR. LYONS: If he can understand the question. It refers to superseding regulations to which he previously testified, and he hasn't been shown the regulations you are referring to. You have only paraphrased it for us.

"THE WITNESS: May I go ahead and answer?



"MR. LYONS: If you can.

"THE WITNESS: I can. Number one, we cannot pick and choose as to which regulations we are going to apply and which we are going to reject. Any regulation that applies to the activities taking place must be complied with.

"Q BY MR. MILLER: So that this inspection would [436] have to be in conformity with all regulations?

"A With all applicable regulations.

"Q All that would apply to this type of fuel line installation?

"A Right.

"Q Would you recall, at this time, who would be the appropriate section chief to have reviewed this type of an installation on this date?

"A Well, the answer is negative, for the very simple reason that I have been out of the agency over five years, and I am not familiar with all of the changes that have taken place.

"Q Well, can you think back to August, September and October of 1965? Do you recall the people who were in charge of those sections at that time?

"A Again, you are asking me to go back and pick out the sections that might have been involved on this particular activity. I thought I made it clear that there was five sections, plus an engineering service representative office. Now, I have no way of knowing which of the five sections were employed in this or participated in this activity. Neither am I aware now as to whether or not any of the engineering service representatives did. There was there of them that might have—there was there of them—"

[437] I believe it was supposed to be, "three of them," but it reads:

"—there was there of them that might have been active in this project, so really you are asking me a question that I can't answer, and this is the reason for it—

"Q Well, just to understand, I'm not asking you this question necessarily in terms of seeking necessarily an accurate answer, but more in seeking assistance in perhaps unearthing the names of people that may be able to give us more information. I won't hold it against you if you identify



somebody that wasn't actually there at the time. Sometimes records of these things are hard to obtain and are unclear, and if you could give me the names of as many section chiefs as you remember—

"A I would hate to try to pull all of those out. I know three of them have retired, and I have heard that there have been some other changes. I'm not particularly sure what they are. I know that there has been some other people that could have been involved that died. As a matter of fact, I helped bury an old friend just before Thanksgiving that might have helped. I'm not in a position to make any kind of recommendation that you have asked for at this particular time, [438] because I frankly am not that familiar with it any more.

"Q You don't recall any—who any of the people were at this time?

"A We have got Glen Welch, the current engineering and manufacturing branch chief. Put it to him. He may be able to help you."

I stopped direct examination at this point, your Honor, and continued with cross-examination by Mr. Chambers, representing Aerodyne. (Reading:)

"Q Mr. McMillan, I'll replot some ground simply because I'm afraid at a later time, the form of the question—somebody may object to it, so I hope you will hear with me.

"A Certainly.

"Q And I will try to be brief.

"A I'm here to help what I can. I don't know how I can.

"Q You indicated that you worked back in 1965 regularly with the section chiefs that were under your supervision; is that correct?

"A In the absence of the branch chief, I did assume that responsibility.

"Q All right, sir.

"A I was his alternate, in other words.

"Q All right, sir, and you therefore knew these [439] people, and you knew that they were knowledgeable in their jobs; is that correct?

"A I was real proud of them.

"Q All right, sir, and would I be correct, sir, in assuming that a part of the function of these engineers that worked in the sections would be to be current and thoroughly familiar with the FAA regulations or CAA regulations, as the case may be?

"A Those FAA regulations were their Bible.

"Q All right, sir, and they were paid to be familiar with them?

"A They had better be.

"Q All right, sir, and would one of their primary functions be, in carrying out their duties, to see that those regulations were complied with in any modification of an aircraft?

"A This is what they were being paid for.

"Q All right, sir. Now, when a project or job came in, such as the installation of a gasoline heater in a Dove, which is the subject of this lawsuit, would someone be assigned to that task who was knowledgeable in the regulations that applied to the installation of a heater?

"A Well, needless to say, in any office you will find people that are stronger in one field than another. [440] When it came to regulations, I think they were all about equally knowledgeable as to what they were, and you were correct in stating that the engineer that was put in or assigned to evaluating that particular engineering data would do a very thorough job.

"Q And would he be fairly familiar with the current regulations applicable to such an installation of a heater as we are dealing with?

"A He was not only knowledgeable and conversant with the regulations current at that time, but because of his experience in administering some of the superseding ones which might be applicable to one of the older aircraft, he was also equally knowledgeable about those.

"Q Now, it would not be abnormal, would it, Mr. McMillan, to have an STC issued based on an actual physical inspection of the installation, as opposed to inhouse blueprint review? That was done, was it not?

"A If there is a very limited number of aircraft that were eligible for certification after modification in accordance

with one of these, the answer is yes, it could be done that way.

"Q All right. Now, we are then talking about the difference in an unrestricted STC and one which is limited to one or two, or maybe three, aircraft?

[441] "A Right; this is a restricted one right here.

"Q And in the instance of restricted STC's, this conformity inspection procedure you have outlined was not abnormal?

"A No.

"Q All right.

"A Because it was in complete compliance with the regulations applicable at that time.

"Q Would you consider a physical inspection of the installation, such as you related would have been done in this case, to be in any way inferior to an inhouse inspection of drawings or blueprints?

"MR. LYONS: Again, are you referring to what has been marked as Exhibit No. 1 in Mr. Hill's deposition, or are you referring to some other type of drawings?

"Q BY MR. CHAMBERS: Well, for Counsel's benefit, what I'm talking about is that, as I understand it, there were two ways to do it. If you have restricted situations, restricted STC situations, you often inspect on the ground to see that compliance with all applicable regulations has been obtained?

"A It's done by the same personnel in both cases.

"Q And in some instances you do it; you technically evaluate it in-house?

"A Well, again, it gets back on one or two [442] machines. You are going to have personnel that helped put this one together, and they generally will be used to put the second one together, but their activity, again, as I said before, is monitored by generally the same personnel, so really what you end up with is just as good a product as you would have if you had elaborate drawings, elaborate controls, and everything else.

"Q That was my question. There is nothing inferior about this procedure, as opposed to having three feet of drawings to look at and review in your office?

"A Well, there is only one thing: If you are doing more than just a few, we would require more data, for the very simple reason that we don't have the manpower to do what we do on the one or two shifts.

"Q Here again, my question is related to our situation where we only had two. There would be nothing inferior about that type of compliance, as to the other type that you would use in an unrestricted situation?

"A The procedures and standards used at that particular time would include the type of thing that you are talking about.

"Q And to insure that the regulations had been complied with?

"A Definitely; that's the primary responsibility.

"Q And as a part of this inspection, you would [443] have also inspected the fuel lines, would you not?

"MR. LYONS: I object to that again. Mr. McMillan or somebody under his direction, or somebody in this office?

"MR. CHAMBERS: Well, are you objecting to the use of the word, 'you'?

"MR. LYONS: Yes

"Q BY MR. CHAMBERS: As a part of this inspection procedure, the personnel performing such an inspection would have included the fuel line in their inspection, would they not?

"A They would do so, since anything that would jeopardize safety would come under scrutiny and evaluation.

"MR. CHAMBERS: All right, now I want to stop at this position right here and put this on the record: In my haste, MR. Miller, to be brief—"

MR. GERRY: Can't we skip that?

MR. MILLER: Well, he is going to modify his questions, which we agreed. Apparently, in Texas, you are supposed to start such question as, "State whether or not." We agreed that his questions could be considered as though they had been stated that way.

THE COURT: All right.

MR. MILLER (Reading:)

[444] "Q BY MR. CHAMBERS: Here again, so that the record will be clear, it's your testimony that the type of in-

spection which would have been performed by your subordinates in these sections would have been to personally inspect the physical aircraft after the installation, and possibly during; is that correct?

"A I would say that the modifications would have been personally inspected, not the full aircraft.

"Q All right, sir, the modifications recited in the STC?

"A Right.

"Q All right, sir, and the person performing that inspection would satisfy himself that all applicable regulations had been complied with; correct?

"A That was his duty.

"Q And he would do so?

"A And he would do so, you darn right.

"Q And he would then report that, if he were not the section chief, and recommend issuance of the STC to his section chief; is that correct?

"A If he was in the sections, he would.

"Q If he wasn't one of the service—

"A If he was a service rep—

"Q He would report direct to you?

"A He would report direct to me.

[445] "Q All right, sir.

"A But he would have coordinated his report to me with the appropriate sections.

"Q All right, sir, and that section chief would then recommend to you the issuance of the STC?

"A If the section personnel were involved, he would.

"Q Okay."

THE COURT: Are we at a convenient point at this time? I assume—how much further?

MR. MILLER: You Honor, we have only a half-dozen pages.

THE COURT: All right. Why don't you conclude that?

MR. GERRY (Reading:)

"A. Of course the engineering service reps, it would come directly into the branch office, because they were under the branch office, or they would coordinated their findings. It was not necessary, under those conditions, to pick anything up from me. That is concurrence from sections.

"Q Now, once this recommendation for issuance got to the branch, that, in effect, was saying, 'We find that it complies with all of the regulations'?"

"A That's precisely what it implied.

"Q And that, 'We further, therefore, consider it [446] an airworthy modification'?"

"A Yes, it would be an airworthy installation after either the inspection by the appropriate FAA personnel, or if it was installed in accordance with approved engineering data.

"Q And would you not affix your signature to what has been referred to, and marked, as Plaintiffs' Exhibit 1, without having the assurance from the appropriate subordinate that the regulations have been complied with, and that the modifications and installation was airworthy; is that correct?"

"A Very definitely."

MR. MILLER: Examination continues with cross-examination by Mr. Lyons, on Page 35, Line 14 (Reading:)

"Q These approvals of the STC's, Mr. McMillan, were they done on behalf of the administrator of the FAA?"

"A Yes, but this is an authorization that has been delegated to the regions and to the branch chiefs.

"Q By the administrator?"

"A By the administrator.

"Q Did Aerodyne have an engineering service representative, to your knowledge, back in 1965?"

"A I really am not that familiar with that organization. I couldn't tell you. As a matter of fact, Aerodyne—I have heard the name mentioned, but—

[447] "Q You just don't know?"

"A I just don't know.

"MR. LYONS: That's all I have."

MR. MILLER: Additional redirect by Mr. Miller started on Page 36, Line 7 (reading:)

"Q Were you acquainted with a Douglas L. Coppinger, C-o-p-p-i-n-g-e-r?"

"A Never met him.

"Q Well, on this particular STC, he has previously testified that he was the man who was assigned to this.



"A This is the application?

"Q Uh-huh, this is the certificate.

"A Now, when the application comes in, the project is under the control of the FAA, and when the people in the FAA give me assurance that everything has been taken care of, I sign it.

"Q And you are not personally familiar with Mr. Coppinger?

"A No, never met him, to the best of my knowledge.

"Q Mr. McMillan, you have described in some detail the type of procedure that was required prior to approval of an STC.

"A Well, this is the standard procedure for any STC.

[448] "Q Plaintiffs' 1?

"A Yeah.

"Q Now, am I correct that your testimony indicated that it consisted of an examination of the documentation submitted, followed by an inspection of the aircraft?

"A We had to have some record as to what the changes were, yes, but for all practical purposes, the actual evaluation and inspection, compliance inspection, by the appropriate personnel, FAA personnel, would result in showing complete compliance with the regulations, or it would be disapproved, one or the other. There is no half-way measure.

"Q And this inspection is to determine compliance with the regulations?

"A With the regulations. This is a standard. Everything is measured.

"Q And would the inspection also determine the airworthiness of the installation?

"A If the inspection showed that it complied with all pertinent regulations, it would be airworthy. Now, if there was any question left, whatsoever, we might ask for further investigation, or some test for this one particular project, to assure ourselves that the regulations were fully complied with before giving [449] approval.

"Q Then the inspection of the actual installation was an integral part of the approval procedure?

"A Definitely.



"Q Could this approval procedure work properly without an adequate inspection?

"MR. LYONS: Objection. May I state the basis?

"MR. MILLER: If you care to.

"MR. LYONS: If you want it, I will be glad to.

"MR. CHAMBERS: You are talking about all instances of all STC's?

"(Thereupon the last question was read by the reporter.)

"MR. MILLER: All right, let me modify that:

"Q Could that approval procedure that you have outlined, that you have stated would have applied to an STC application such as was shown in Plaintiffs' 1, could that procedure have worked properly without adequate inspection?

"A Well, I don't quite understand what you are getting at. Just let me say this—

"Q Well, don't answer it if you don't understand. Let's have the girl read it again.

"A I remember what you said.

"MR. MILLER: Would you please read the question [450] again?

"MR. CHAMBERS: He didn't say he didn't hear it; he said he didn't understand it.

"MR. MILLER: I know, but I think he may understand it if it's read again, because I was trying to get my language correct.

"(Thereupon the last question was read by the reporter.)

"THE WITNESS: I'm not sure that I understand what you asked for, but let me say this, that we must, before we make any approval of any modification, we must determine its compliance with the appropriate Civil Air regulations. We do, or did a rather comprehensive review of an installation and the applicable regulations, whether or not these regulations were satisfied. Now, if we hadn't looked at the installation with this data, you would never have gotten your approval.

"MR. LYONS: By, 'this data,' are you referring to Exhibit No. 1?

"THE WITNESS: No. 1.

"Q BY MR. MILLER: Then am I correct in gleaning from what you have said, that an inspection would have had to be done in order to properly approve this particular STC?

"A Right.

[451] "Q Is that correct?

"A This is the way it would have to be done. In other words, you have got to know whether or not the installations met the applicable regulations, fully comply with it, and I don't know how you could make that determination without an inspection.

"Q It's a documentation as shown in the Hill Exhibit No. 1, which is referenced on the STC application, Plaintiffs' 1 here. It's not adequate in and of itself for an approval?

"A Right."

MR. MILLER: That is the end of Mr. McMillan's deposition, your Honor.

THE COURT: All right. Thank you, gentlemen.

This might be a convenient point, then, to take our evening recess. Is 9:30 a convenient time for all parties tomorrow morning?

MR. MILLER: Yes, your Honor.

THE COURT: We will be at recess until that time tomorrow morning.

(Whereupon an adjournment was taken until 9:30 o'clock A.M. of the following day, Friday, January 31, 1975.)

TESTIMONY OF DAVID H. HOLLADAY  
FEBRUARY 5, 1975

[883] interpretation, he certainly should have been able to recognize what the importance of that paragraph is and what it requires him to do.

Q (BY MR. GERRY): Is that one of the things referred to by Mr. McMillan as the "Bible of the FAA inspector"?

A Yes.

MR. COOK: Objection.

THE COURT: The objection is overruled.

Q Did those photos show the entire installation?

A No.

Q 23.609 requires protection of structure: each part of the structure must, A, be suitably protected against deterioration or loss of strength in service due to any cause, including, one, weathering, two, corrosion, and three, abrasion; and, B, have adequate provisions for ventilation and drainage.

Were any of those violated in this installation?

A Yes.

Q Which, and in what manner?

A I believe the two which refer to corrosion and abrasion were violated.

Q In what manner, sir?

A The juxtaposition of dissimilar metals, copper and steel, and the failure to provide adequate attachment [884] of the lines for sufficient rigidity and protection against vibration as well as rubbing or abrasion against other surfaces.

Q Were those readily available to anyone; that is the outward manifestation of that readily available to anybody who made even the most cursory inspection of the fuel line and its routing for this heater?

A Yes.

Q Was such an inspection for those items required under the STC Manual and the parts which you have given to us and especially Part .5106 of page 35 thereof?

A Yes, it makes specific reference to it in the form of very detailed instructions as to what he is to do and what

he is to look for in the course of performing his conformity inspection.

Q Under 23.611, which states: There must be means to allow close examination of each part requiring recurring inspection adjustments for proper alignment and function, or lubrication, was such provided in this installation?

A No, it was not, and that alone, without any other examination, would have been sufficient, in my judgment, to have completely rejected this particular installation and have refused the issuance of the STC.

Q And is that part of the reason that only a short time thereafter Butler had to put in an access door, for

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[899] A. In respect to the mounting of the tanks in this aircraft, they met the required standards; however, when you consider, under combustion heaters, that it points out that all of the standards that are applicable to tanks and to lines must be met, then it was violated in the sense that that particular part pertaining to tanks and its relationship to lines apparently was not included in the examination of this aircraft or the consideration of this fuel system in its application in this particular supplemental type certificate.

Q Would that be apparent to anyone making the cursory inspection for examination of the installation?

A Yes.

Q 23.993, fuel system lines and fittings: A, each fuel line must be installed and supported to prevent excessive vibration and to withstand loads due to fuel pressure and accelerated flight conditions; and B, each fuel line connected to components of the airplane between which relative motion could exist must have provisions for flexibility.

Was that section violated in this installation?

A Yes.

Q And in what regard was that section violated?

A It was violated in regards to both of those subparagraphs of that section. First, the fuel lines and [end of page 899.]

[908] MR. COOK: Your Honor, I move to strike that answer as contrary to the evidence in the motion picture

which showed the stainless steel line from the belly fitting up to the upper corner to have been 33 inches as contrasted.

THE COURT: The objection is overruled. You may inquire on cross-examination.

Q (BY MR. GERRY): Now, was that readily apparent to anyone who made the most cursory examination of that line in its run from the cockpit floor or baggage compartment ceiling down to the belly of the aircraft an back to the first retention block?

A Yes.

Q And under that custom and practice, how many clamps would be required on that run of line?

A Starting at the point at which the line reaches the sloping bulkhead, forward side bends were made in that line at that point, and fittings were installed at that point. For each of the fittings installed, a clamp should have been placed adjacent to the fitting over the line, because of the weight of the fitting and the necessity to support that.

From the fitting where the clamp is installed, a clamp should have been installed each 12 inches of the line, as a minimum, or at additional locations necessary to properly retain the line. So, taking 36 inches of line and assuming [909] clamps installed at the fittings, at least two clamps would have been required to be installed between those.

Q That would be on the forward side of the sloping bulkhead if the line was run that way?

A Yes.

Q Would it be readily apparent to anyone giving the most cursory examination or inspection of this aircraft if those two clamps were missing?

A Yes.

Q Would it be readily apparent to anyone giving the most cursory examination or inspection of this aircraft that the two clamps, which should have been there on each side of the turn at the belly, right at the sloping bulkhead, were missing?

A Yes.

Q Did these lines run between areas where there was relative motion?

A Yes.

Q What are those?

A There would have been some relative motion between the floor of the cockpit and the sloping bulkhead—relative motion at least by the weight of the persons seated in that area. There would have been relative motion also between the line on the sloping bulkhead and the line in the belly of the aircraft.

[912] cursory examination or inspection of that aircraft?

A Yes, and particularly if that examination had been performed in accordance with the Federal Aviation Agency type certification manuals document 8110.1, supplemental type certificate procedure.

Q 23.1191, fire walls: A, each engine, auxilliary power unit, fuel-burning heater, and other combustion equipment intended for operation in flight, must be isolated from the rest of the airplane by fire walls, shrouds, or equivalent means; B, each fire wall or shroud must be constructed so that no hazardous quantity of liquid, gas, or flame can pass from the engine compartment to other parts of the airplane; C, each opening in the fire wall or shroud must be sealed with close-fitting, fireproof grommets, bushings, or fire wall fittings; E, each fire wall and shroud must be fireproof and protected against corrosion; G, fire wall materials and fittings must resist flame penetration for at least fifteen minutes.

Was that section violated?

A Yes.

Q In what regards was that section violated?

A In all regards and in all respects. First, the combustion heater was grounded in the baggage compartment in the left-hand side of the nose wheel well. All of that structure in that area is typical aircraft aluminum structure.

[913] When the heater was installed, this particular paragraph was apparently disregarded. There was no fire wall. The wall which was installed was made of aluminum and thin sheet aluminum. In addition, assuming the capability of the aluminum fire wall, which is roughly good for fifteen to twenty seconds in the event a fire should occur—

Q Rather than the fifteen minutes required?

A Yes.

Assuming the capabilities of that aluminum material to withstand temperatures to fifteen or twenty seconds, which is based upon Civil Aeronautics Administration tests conducted in 1943, it could not have performed even that function because it was not adequately installed. It was put in with metal PK screws to hold it in position.

The nature of this design and installation required that it be cut in two parts. No sealing was required for the installation of those two parts. Rubber grommets were used for openings.

Q Are the rubber grommets fireproof as required by the fire wall?

A No, they are not. There are fireproof grommets, but a rubber grommet is not a fireproof grommet.

Other holes in the fire wall were not sealed by grommets or by any other means. There was no sealing provided around the external perimeter of this thin sheet aluminum, [914] and there was no attention given to the control of any fire which might develop in that area around the inside surfaces of the aircraft structure.

If I may, I would like to refer to that STC package at this point which shows a photograph of it because you can clearly see that there is an open gap in the fire wall which is readily apparent to anyone who would have inspected it and approved it on the basis of the so-called drawings that were submitted, which are photographs of the installation.

MR. GERRY: Might I approach the witness, your Honor?

THE COURT: Yes, sir.

Q (BY MR. GERRY): I will show you Plaintiffs' 30C.

MR. COOK: Your Honor, perhaps he should refer to what it is described as in the document. I believe that the center fire wall does not appear.

MR. GERRY: All right.

Q (BY MR. GERRY): Could you demonstrate to his Honor what you mean—the area that shows the open gap?

A Yes. What I am referring to is Aerodyne Engineering Corporation Drawing D205141, dated 7-28-65, sheet 2 of



6, which has a photograph which is identified by a caption, "Heater installation, 35,000 BTU." It shows the aft portion of the heater, plenum chambers or ducting, and it shows the two sections of the fire wall which I referred to, and it is quite obvious in the photograph that there is a fairly large [915] opening at the bottom of the plenum chamber where the two sections of the so-called fire wall come together, and that there are other openings, cutouts in these two pieces of metal, that they are not sealed or secured, and that there are no sealings in this so-called fire wall at the point through which various of the lines pass.

It is my understanding that those were the documents which were submitted through the Federal Aviation Agency as the basis for approval of the STC.

Q Would it be apparent to anyone making the most cursory examination of this installation that that would not meet the requirements of 23.1191?

A Yes, and further to that, even if the photograph had not been submitted, the writing on the sheet to which the photograph is attached calls out as specifications, the installation of—I think it's 2024ST alclad, which is aliminum.

Q So, inspectors knowledgable—knowledgable inspectors in this field are required, are they not, to have knowledge of the fire-resistant capabilities of this kind of material?

A Yes. As it was covered yesterday in the Federal Aviation Agency supplemental type certificate manual, it even refers not only to the requirement for stainless steel, but it points out that attention must be given to the thickness [916] of the fire wall material to prevent its warpage because, if that material is too thin, and it is then subjected to the in-flight fire temperatures, warpage will occur which will destroy the integrity of the fire wall, even though it is stainless steel sheet.

Q There has been a suggestion here, Mr. Holladay, that the heater itself contains its own integral, quote "fire wall," end of quote, in that the fire chamber has around the outside of it a stainless steel—another wall of stainless steel. Is that a fire wall which would comply with the requirements of 23.1191?

A No, it is not. The contention that the combustion chamber is surrounded by two layers of stainless steel—that is true. That is correct. But the purpose of the fire wall as called out in the regulations, is to protect against such things as the burn-through or rupture of the combustion chamber during the normal course of its use and operation and between inspection periods, and in addition, to protect against the fire which may occur or originate externally to the combustion chamber and stainless steel walls in which it is contained.

Q Subpart F of 14 CFR, equipment general, found in 23.1301, that would be subpart "F" of 23, function and installation: Each item of equipment essential for safe operation, including radio communication and navigation [917] equipment, must, one, adequately perform its intended function; two, in the case of equipment other than radio communications and navigation equipment, function properly when installed; four, where appropriate, be adequately labeled as to its identification, function, and operating limitations. B, whenever necessary, additional equipment that is installed as prescribed in the operating rules of this chapter, must meet the requirements of this section.

Was that section violated?

A Yes.

Q In what way?

A In numerous ways. In the first place, there was an apparent failure in respect to an overall evaluation of the fuel system and the fuel supply to the heater. There was no attention given to an adequate description of the function of the fuel system as it related to the heater. Nothing was provided insofar as information was concerned as to the source of the fuel supply for the heater. Nothing was provided as to information concerning the control of the flow of fuel through the fuel line to the heater. No information was supplied as to the fact that that line would either be subject to free flow based on fuel tank pressure air or to pressurized fuel based upon operation of the electric boost pump in the tank.

Failing the provision of that information, no [end of page 917].

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MARCH 13, 1975

[1430] correction, the 2nd of January, '67, which would have been a year and a few days, a few weeks laer. Will you assume for me it had two annual inspections?

A Yes, sir.

Q And that, as well, it underwent hundred hour inspections in September, 1965, November 1965, February of '68—I have skimmed over three years, two years, when it was operating with Air Wisconsin, and April 1968, June 1968, August 1968, and I think I skipped one in February 1968, essentially ten one hundred hour inspections, not counting about three years, or two years, while it operated for Air Wisconsin. Now, sir, what is your opinion, or do you have an opinon as to whether this fuel line, as it comes up from the belly, behind the sloping bulkhead, and up all the way, up to the upper right hand corner, in photograph, exhibit no. 41B, and up and beyond the upper right hand corner of 41B, do you have an opinion as to whether that line should have been inspected in its entirety from the belly of the zircraft up to the upper right hand corner, during each of those respective enumerated inspections?

A Yes, I have an opinion.

Q What is your opinion?

A It should.

Q It should have been inspected?

A Yes.

[1431] Q And should have been inspected for airworthy condition?

A Yes.

Q Then it was secure?

A That raises some questions in my mind.

Q The line was secure?

A No, I said it raises some questions in my mind, based upon what you said, if it was secure, did I misunderstand your question?

Q I will withdraw the question, Mr. Holladay, and try to rephrase it, make it easier for you to answer. Is it your opinion that such an inspection, each one of those inspections, that I have enumerated, should have included an inspection to see whether the line was secure?

A Yes, except that still raises some questions in my mind, as to the division of responsibility.

Q Is it your opinion, sir, that such an inspection should also inspect to determine whether the fittings are secure?

A Yes.

Q And not leaking?

A Yes.

Q And tight?

A Yes.

Q And should that inspection also include an inspection [1432] to see that there is no chaffing or grating on the line?

A Yes.

Q Or a leak in any location, of any type?

A Yes.

Q Would such an inspection include operation of the heater, sir, or should such an inspection include operation of the heater?

A You have asked me one there that I am not sure about, I don't know whether that is included on hundred hour inspections or not. Certainly, the examination of the heater from a visual viewpoint a view is included.

Q And security of the whole thing?

A Yes.

Q Now, would it be your opinion, sir, that such an inspection would include operation of the engines?

A Certainly.

Q And would that include operation of the fuel boost pumps?

A Yes.

Q Would it be your opinion that this would occur while those inspection panels are removed, revealing the fuel line there?

A No, not necessarily. Now, the operation of the engines takes place at two points, if it is done correctly.

Q Not necessarily is your answer. Is it essential [end of page 1432].

[2460] SAN DIEGO, CALIFORNIA, WEDNESDAY,  
APRIL 2, 1975, AT 1:30 PM

THE COURT: Good afternoon, ladies and gentlemen.

THE CLERK: Your Honor, number two on the calendar is Case No. 70-138, No. 71-36, No. 71-37, No. 71-38, and No. 71-39, for further Court trial proceedings.

THE COURT: The Court would find counsel present with the exception of Mr. Cook.

Well, ladies and gentlemen, I have given the matter much thought since our last session. I have some comments to make which I hope will be helpful to counsel. As I indicated at the close of the last session, I would compliment counsel on the manner in which this case was presented. I think all the facts that were available to counsel were presented to me, and I think counsel have discharged their obligations to their respective clients in a highly professional manner.

Of course, now it would be incumbent upon me to discharge my obligation as trier of the facts. I consider this to be an extremely close case. The case turns on what I consider to be a critical issue, and I think the evidence on that point, which I will allude to later, is very close.

The parties know this accident occurred in October of 1968 when this De Havilland Dove crashed as the result of an in-flight fire. Four persons were killed.

[2461] That De Havilland Dove was put into service, as I recall the facts, in 1953. That aircraft had a heater installed in the summer of 1965, which was a little over three years before the date of the accident in this case.

It is the plaintiffs' position that the heater installation, the subject of a Supplemental Type Certificate, was accepted by the FAA as an airworthy installation when in fact it was not. The issue before me, then, is: Was the FAA negligent in its approval or inspection? Was this installation in fact airworthy; and if not, was it the proximate cause of the fire?

The legal authority exists for such liability if the plaintiff proves his case, and the most recent pronouncement that I am aware of is *Arney v. United States*, 479 F.2d 653. That

case happened to be a panel in which I participated in the decision rendered. At page 658, that Court stated:

"The Civil Aeronautics Act, the predecessor of the Federal Aviation Act of 1958, was enacted, and regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air," citing cases. "The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the Government may be liable for negligence in improper issuance of a type airworthiness certificate," again citing cases.

[2462] So I have attempted to analyze, gentlemen, in the light of that mandate, the facts in this case. We are, of course, attempting to reconstruct an accident. We are utilizing the testimony of an eyewitness, Mr. Telles; various experts who testified as to fire, airworthiness, fuel and air tests; and the appropriate FAA regulations.

We have heard testimony from men who installed and designed the heater installation, from officials from FAA who approved the installation. We have examined the physical evidence at the scene. We have had testimony from the men who have examined and worked on this heater line. We have the physical evidence itself of the sister ship, 41B. I would find that installation to be substantially identical to the installation in 40B, the subject of this case.

Pursuant to my responsibility, I have examined the physical evidence, the exhibits. I have reviewed the testimony of the various witnesses, and I have attempted to analyze the evidence in the light of the specific issue presented here. I have reached certain conclusions, and I would be prepared to find certain facts as proven to my satisfaction. I am articulating them to the end that the parties might know the basis for my decision, and if it be erroneous, that upon review, it may be corrected.

Using the framework Mr. Gerry suggested in his argument, which Mr. Cook adopted, I would find and conclude in the [2463] following manner: First of all, as to the cause of the fire, or the source of the combustion, I would concur, as I think all the parties litigant concur, that gasoline was the combustible here involved. The spread of the fire, its

intensity, the expert evaluation of Mr. Jasich, I think, makes that an academic question.

Secondly, where the fire started. I would find that the fire started in the vicinity of the baggage compartment, adjacent to the sloping bulkhead. I have considered the situs of the fire or the start that might have resulted from a spill in the gas tank top, from a break in the flex hose leading from the engine, and from a fuel tank leak. I find that those sites are not supported by evidence that has been presented to me. I think the physical evidence suggests that the area of the sloping bulkhead in the vicinity of the baggage compartment is the site.

Mr. Jasich's testimony, to me, is persuasive also. He is the only so-called fire expert presented, and I find his testimony to be persuasive in the conclusion he reached and the factors upon which he predicated that conclusion.

The condition of the remains of the plane are consistent with this being the site of the fire or the origin of the fire and, to me, appear to be inconsistent with any other known source; for example, I think, if the fire had its genesis in the wing root or in the flex line, that the flaps [2464] would have been burned or consumed. They would not have been scorched as the physical evidence in this case would indicate.

The next area, the source of that gasoline, I would find to be the primer or the heater line. That was the only gasoline line forward of the junction block in the midsection of the plane.

The next area would be the source of ignition, and, as several witnesses testified, I think that is unknown. I think many sources of ignition did exist, and I think the prime candidate for that would be the electrical cables in the right side of the baggage compartment. Certainly, static electricity and the other factors enumerated by Mr. Jasich could provide that source of ignition; but one thing I am completely satisfied with is that the heater line supplied the gasoline which was the source of the fire, which caused the crash. I think that is well established by the evidence.

Not in any way to belittle any witness, but so that the parties may know my evaluation here, I discount the testi-



mony of Mr. Young on the origin of the fire; and given the physical evidence in this case, I would find his conclusions to be unpersuasive.

I would hold the failure of the heater line to be the critical factor in the fire and, thus, the crash. It is my conclusion that if this primer line were not in this plane, [2465] that there would have been no fire.

Next, moving on to the heater installation, the circumstances of the installation, to my mind, were not indicative of quality design and/or workmanship. It is significant to me that there was a lack of any real expertise in the design of this particular installation and the qualification of the men who prepared for this installation. By that, I have in mind the testimony which was given of Mr. Hill, particularly, and I believe Mr. Coppinger.

Secondly, I am concerned to some extent with the use of photographs after the work was done, rather than drawings; but I accept the testimony of other witnesses that this was not particularly an abnormal occurrence. I am concerned about the use of varying materials; for example, the copper, and I would find this line to be copper. Absent any evidence to the contrary, given the testimony of Mr. Holladay, since that's the only testimony before me aside from my own observations, I would find it to be copper.

The use of copper and stainless steel together in this installation and the manner in which this whole configuration was designed: I am concerned about the lack of flex material where movement would be anticipated. I am concerned of the lack of rigid support for the heater installation line. By that, I mean the use of a grommet for a supporting device; and particularly the lack of clamping at reasonable intervals. [2466] I am concerned about the closeness of the stainless steel line to the bulkhead described in—I believe it is 41B, plaintiffs exhibit. I am concerned also with the amount of movement permitted, as shown by the film introduced by the plaintiff, when manually manipulated by Mr. Holladay. It would seem to me that the amount of movement permitted would be impermissible and is unsafe, given a small plane, given turbulence, given unusual circumstances in landing such a craft. I would just think that this

would be, based on the testimony of Mr. Holladay, particularly an impermissible amount of movement of that line.

Lastly, I am concerned with the bending of that line, also, and the manner in which it was done. I would hold that all the defendant's experts would agree, it seemed to me, that if that line could rub on that bulkhead or come in contact with it, that, in their judgement, that line would not be airworthy; and I certainly think that line could come in contact with the bulkhead. Whether we bring into play Rule 23.933, whether we talk in terms of usage and customs of the industry, it seems to be almost academic. We have the plaintiffs' expert saying that line is unairworthy. We have the defendant's experts saying, if they made such an examination, in their judgement—they testified here that it was an airworthy installation, but that if it could reach that bulkhead, in their universal opinion, each one as he testified, [2467] said that, "In my opinion, it would not be airworthy."

I would find, based on the film and then the examination of that line, that it certainly could reach that bulkhead and come into contact with it. So, what in effect I am saying, relative to that installation was: I would find that there would be too much play in that line, too much occasion for vibration in the normal operation of the aircraft.

Now we find ourselves in the situation of whether the FAA either did not examine that line, which I think would be negligence, before they approved it, or if they did and passed it in this condition, that they would be derelict in their responsibility.

Given my observations of the line, and considering the testimony here, I am not so much concerned with the placement of a placard or what is on the placard, or even so much the precise location of the shutoff valve or the mechanics of compliance with the heater shroud requirements. All of those factors may indicate a lack of attention that deals with the inspection that was either had or was not had, but I think, critical to the regulation of this case is the mounting and routing of the fuel line and the problems that would be created by the vibration of that line.

I would accept, for the reasons stated by Mr. Holladay, that that line, as intalled, was unairworthy. I do not feel it is a question of whether or not five clamps would be [2468] better than one when one would be adequate. I am aware that the FAA's duties concern minimum standards; but this line from 41B, the only thing we really have to go by—I would, of course, find it sufficiently similar to be probative—in this condition was not airworthy, and I think, if each individual defendant's expert witness had had the responsibility of the initial inspection, I am led to conclude that he would have found it so at the time of that examination. I think more clamps would have been required and some change in the use of the metals or the configuration of the routing would have been had.

So I would find that this line, based on the testimony before me, was not airworthy.

A word about the tests that were conducted: The fuel test, I think, with the varying results achieved by Mr. Holladay and Mr. Gibson, and the formula which was ultimately used by Mr. Gibson, I do not think is of too great a moment. When I correlate, in any event, the tests that were actually run, the mathematical formula which could or should be utilized, when I correlate that with the testimony of Mr. Jasich, I am satisfied there was sufficient fuel to fuel the fire.

If the flexible line, rather than the heater line had ruptured, I think you would have an inordinate amount of fuel, and I would certainly, as I indicated before, expect to see those flaps burned—burned, not scorched—burned and [2469] consumed. So think there was sufficient fuel in the time frame in which we are speaking. There was sufficient fuel to be consistent with the damage which was observed and which was caused.

As to the airframe test, I think that the device used had to be, or at least my reaction to it was that it was quite selective. The fact that it did not show any indication of the ram air in the baggage compartment is a significant factor to me when we know ram air was present. I do not think we are dealing here with a completely airtight compartment. We know that it is not watertight based on the testi-

mony of Mr. Schossow, and we know that it is not airtight. There were outlets under the cockpit door, and I am satisfied, based again on the testimony of Mr. Jasich, that fire would create its own draft. What I am saying about the air test is this: that I do not find it to be that probative, that there was very minimal air movement in the baggage compartment. I would find the air test, given in this case, to be of limited value in assisting the Court in the movement of the fire.

That leads me to the next point which deals, really, with the issue of proximate cause. If the FAA had approved this plane and certified it as airworthy, and it had no running lights, the plane would be unairworthy; but those facts would have nothing to do with the accident. They would have nothing to do with proximate cause.

[2470] So the next issue confronting the Court, as the trier of facts, is: Did this unairworthy line, three years later, proximately cause this fire?

As to the three-year time frame, I would expect, if the vice here is metal fatigue and vibration stress, you would not expect to see the results of that vice within thirty days or six months. It is the kind of trouble that would be gradual. As I recall the testimony, there were some fifteen hundred hours in the air for a period of time when this plane was being operated as a carrier. I would feel that three years would be consistent with the plaintiffs' theory of liability. Certainly, if there was a structural flaw in the metal used or a structural flaw in any of the couplings, that would have manifested itself long before three years.

I find myself in this position: that I am satisfied the failure of this line caused the fire and that this line was unairworthy, primarily because of the lack of support and the use of an unannealed copper with the stainless steel line, which would permit, in my judgment, excessive vibration and fatigue, metal fatigue. Yet, I would find specifically that the line did not fail where the plaintiff would assert that it did—in the vicinity of the bulkhead. My reasons for that conclusion are these: I find no marks on the stainless steel line from 41B on the line itself where I feel, based on this evidence, it would come in contact with the bulkhead.

[2471] Secondly, I find it of some significance that Spider, rather than repronouncing names, Spider detected no chafing on that line during the course of his inspections. Thirdly, I find it significant that Mr. Holladay made notes that were "chafing marks," but yet, among all the photographs, this was a photograph that was not taken to reflect those chafing marks. Lastly, what I will call the "cut" marks that are so dramatic and graphic on the line now, I feel satisfied, came from the unrelated accident which occurred to 41B at a time far removed from the incident in his case.

I base that on the fact that there are some of those—again, what I will call cut marks—three quarters of an inch apart, that they appeared to be severe, sharp, dramatic injuries to the line; that they occur on several sides of the line; that, from the photographs introduced, there was an accident which caused the injury to adjacent parts of the aircraft, which are consistent with the cuts observed on the stainless steel line; and, certainly, I cannot conceive reasonably that the area described by Mr. Holladay as chafing marks are the areas we now see as cut marks. In other words, I do not think he would not describe what we now see on that line as being some evidence of chafing. I do not think he could be talking about the same marks.

Now, if I had to engage in reasoned speculation, and I use that term advisedly, I would reason that the high probability [2472] of failure in that line would occur at the wedding of the copper and stainless steel line, at the coupling junction fitting, that that was the source of the leak and the situs of the fire. I think the burn patterns purport and tend to confirm that. I think the vibrations would have a decided effect on that junction of those lines and those fittings specifically involved at that location.

Now, gentlemen, I think this has been a difficult case for everyone. It's been an extremely difficult one for me. I know counsel have labored for many months and years in connection with this litigation. I am satisfied no one can every reasonably know for a certainty, given the remains of this plane, what precisely happened and the sequence in which it did occur. I am also satisfied these are all the facts we will probably ever have.

That brings me to what I call the extremely close critical question that I referred to in the beginning of my remarks: If the Plaintiff, by his proof, must show me where on this line it failed, he has not, and I think, cannot, and I would reject the most logical place he shows me—the bulkhead—as being the place where it did fail. But, if, as I view it, he must show me that this heater line installation was unairworthy because of the choice of materials, because of the routing, because of its lack of support that would render it subject to unreasonable fatigue and vibration, and if he must [2473] also show me that this unairworthy heater line failed and was the source of the fuel for the fire, and further that the failure of the line was probably occasioned by the defects in its installation which I found made it unairworthy as different, say, from a defect in the heater shroud or warning placard, then I think he has proven his case and liability would attach.

Gentlemen, that is what I would find in this case. I consider this by way of an analogy to a city inspector who approves gas line in a dwelling. If the couplings were fitted throughout that line in an unworkmanlike manner, and the city inspector should have never passed the line, when the house is destroyed, when the gasoline erupts, I do not think the homeowner has to prove which coupling gave way, but if the defect which made it unacceptable for approval in the first place has the high probability for the failure, then I think he has made out a cause of action.

So I would find that it is more likely than not, it is more probable, in my opinion—more than fifty percent, if I have to go to percentages—that the vibrations were the cause, based on this evidence, rather than, say, a structural flaw; and I would find that to be an essential ingredient in the proximate causation.

So, gentlemen, my finding would be that the line was unairworthy, that it was unairworthy because of excessive [2474] vibrations which would be occasioned by the lack of support and aggravated by the use of dissimilar metals, including the particular problems pertaining to copper; that this is the line that failed, and it failed because of the de-

fects that made it unairworthy; and that this failure was the proximate cause of the accident.

Now, gentlemen, that is my very best judgement. I consider it a close case. I have discussed it at length because I have given you my reasons. I want to make sure that it is grossly apparent on this record how I decided this case and the reasons I found to be significant. These remarks of mine, I think, should constitute a portion of the findings of fact and conclusions of law. I would ask Mr. Gerry and Mr. Miller to prepare specific findings and conclusions on this issue of liability. Submit them to the Government for approval as to form.

Now, gentlemen, I think that speaks to all present issues before me. Is that your understanding, Mr. Gerry? Mr. Miller?

MR. GERRY: Yes, your Honor, except that I would like to hear your Honor say the words "I find for the plaintiffs."

THE COURT: I would find liability, and so I would find for the plaintiffs on that issue.

MR. GERRY: Thank you.

THE COURT: Is there anything further unresolved at this time, Mr. Quinton?



**In the Supreme Court of the United States**

No. 82-1349

UNITED STATES, PETITIONER,

*v.*

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES);

AND

UNITED STATES, PETITIONER,

*v.*

EMMA ROSA MASCHER

ORDER ALLOWING CERTIORARI. Filed May 16, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with case No. 82-1350, *United States v. United Scottish Insurance Co., et al.*, and a total of one hour is allotted for oral argument.

**In the Supreme Court of the United States**

No. 82-1350

UNITED STATES, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ORDER ALLOWING CERTIORARI. Filed May 16, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with case No. 82-1349, *United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, and a total of one hour is allotted for oral argument.

**AUG 12 1983**

STEVAS

Nos. 82-1349 and 82-1350

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES)

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UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

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**PETITIONS FOR WRITS OF CERTIORARI FILED**  
**FEBRUARY 10, 1983**  
**CERTIORARI GRANTED MAY 16, 1983**

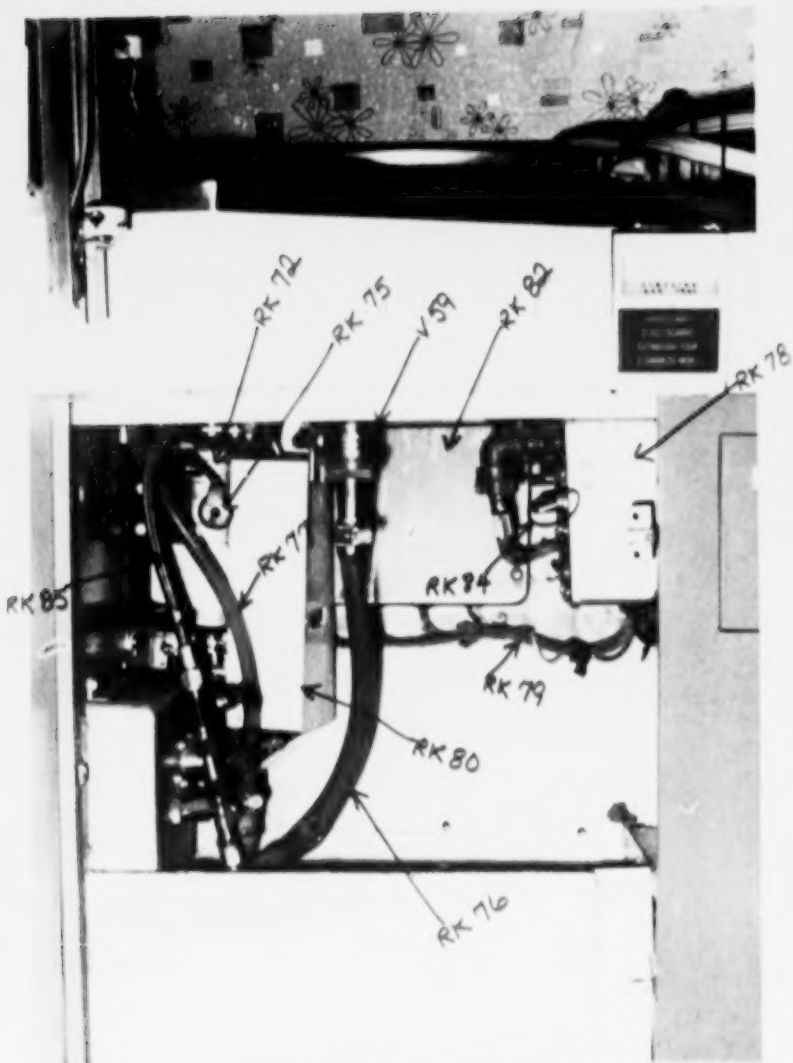


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EXHIBIT NO. 25.6

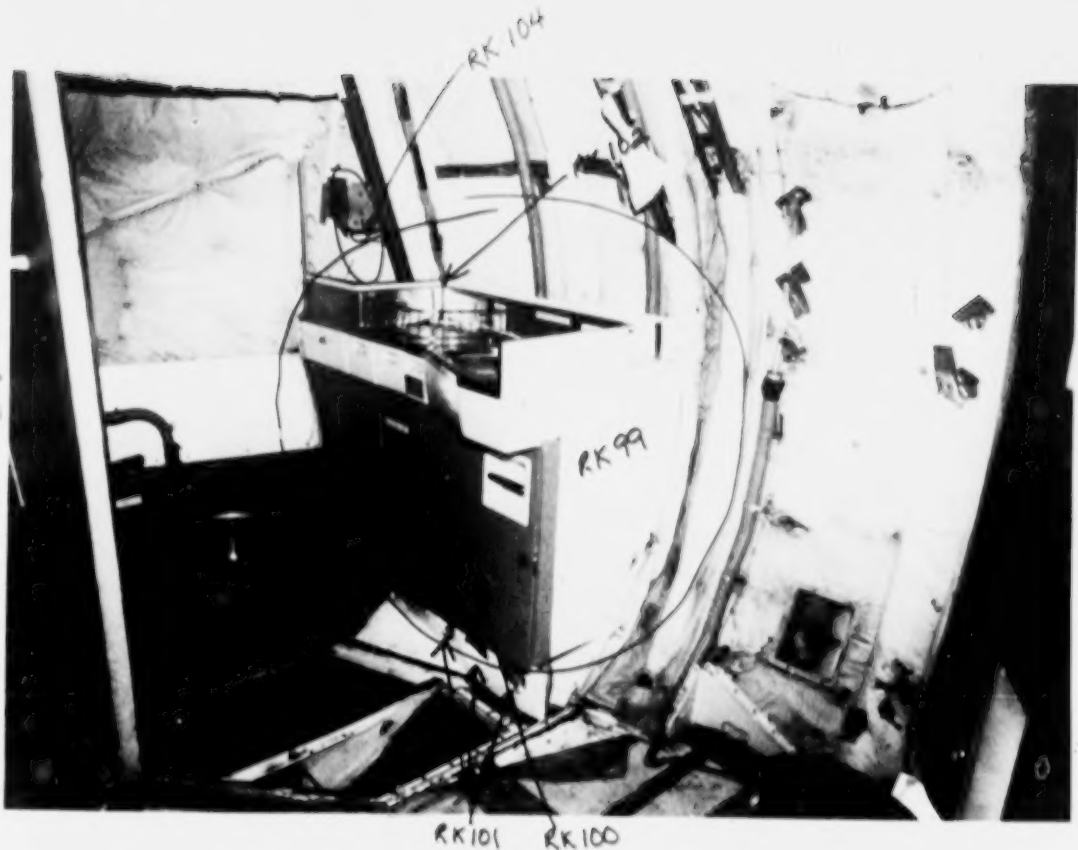


A-3 EXHIBIT NO. 25.10



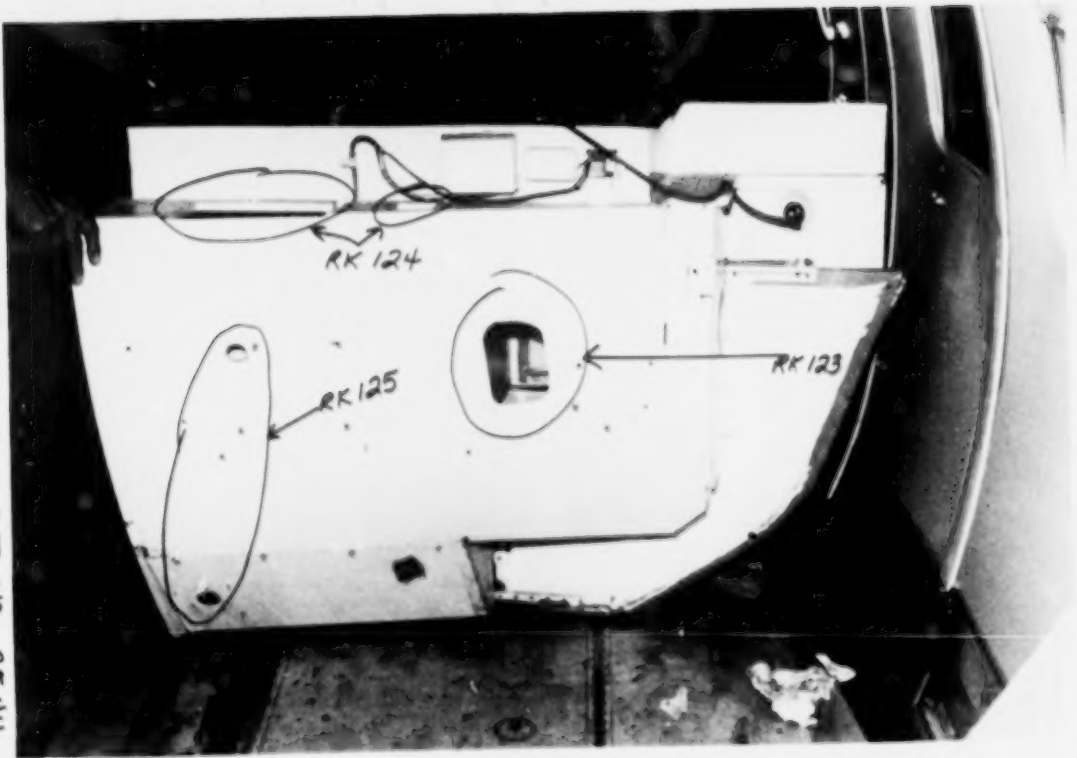
A-4 EXHIBIT NO. 25.11

A-5 EXHIBIT NO. 25.28

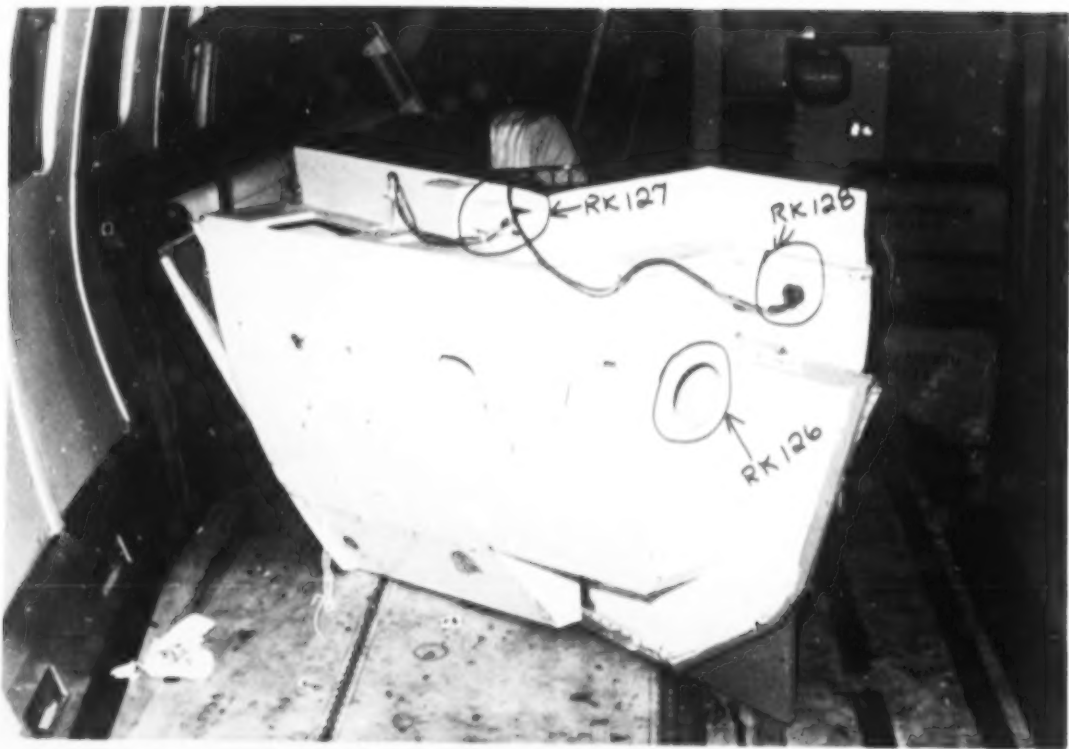




A-6 EXHIBIT NO. 25.44



A-7 EXHIBIT NO. 2545



Nos. 82-1349 and 82-1350

Office - Supreme Court, U.S.

FILED

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**In the Supreme Court of the United States**

ALEXANDER L. STEVAS,  
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OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

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UNITED SCOTTISH INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act as a "private individual under like circumstances" for the Federal Aviation Administration's alleged failure to discover a safety defect while carrying out its regulatory duty of certifying the airworthiness of aircraft in commercial aviation.

2. Whether suits against the United States alleging that the FAA negligently certified an aircraft's design and a heater's installation as complying with minimum safety standards, as part of the agency's effort to regulate compliance with those standards, are barred as claims based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

3. Whether suits against the United States alleging that the FAA negligently inspected and certified an aircraft's design and a heater's installation are barred as "claim[s] arising out of \* \* \* misrepresentation" within the meaning of 28 U.S.C. 2680(h).

## II

### **PARTIES TO THE PROCEEDING**

Respondents not named in the caption to No. 82-1349 are listed in 82-1349 Pet. App. 18a-24a. Respondents not named in the caption to No. 82-1350 are Kathryn Fleming, Maxine Cearley, Simone Weaver, and John W. Dowdle.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 82-1349

UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES)

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UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

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No. 82-1350

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The opinion of the court of appeals in *Varig Airlines and Mascher*, No. 82-1349 (Pet. App. 1a-7a), is reported at 692 F.2d 1205.<sup>1</sup> The findings of fact and conclusions

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<sup>1</sup> This opinion was originally handed down on October 8, 1982. It was subsequently reissued on October 26, 1982, to include *Emma Rosa Mascher v. United States* in the caption.

of law of the district court (Pet. App. 8a-13a) are not reported.

The opinion of the court of appeals in *United Scottish Insurance*, No. 82-1350 (Pet. App. 1a-6a), is reported at 692 F.2d 1209. The opinion of the district court (Pet. App. 7a-15a) and its findings of fact and conclusions of law (*id.* at 16a-27a) are not reported. An earlier opinion of the court of appeals in *United Scottish Insurance* is reported at 614 F.2d 188.

### JURISDICTION

The judgments of the court of appeals in No. 82-1349 and No. 82-1350 were entered on October 8, 1982 (82-1349 Pet. App. 16a, 17a; 82-1350 Pet. App. 30a). On December 28, 1982, Justice Rehnquist extended the time within which to file petitions for a writ of certiorari to and including February 11, 1983. The petitions were filed on February 10, 1983 and were granted on May 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act are set out in a statutory appendix (App., *infra*, 1a).

### STATEMENT

#### 1. *Federal Regulation of Air Safety*

The federal government first entered the field of general aviation safety in 1926, when Congress passed the Air Commerce Act, ch. 344, 44 Stat. 568 *et seq.* Prior to that time regulation of the industry had been left to the states or municipalities. "[T]he Air Commerce Act \* \* \* asserted the right of the federal government to regulate interstate flying and provided for the inspection and regulation of commercial aircraft \* \* \*." E. Freuden-thal, *The Aviation Business* 77 (1940).

Regulatory authority under the Act was delegated to the Secretary of Commerce, with a specific provision calling for the "rating of aircraft of the United States as to their airworthiness." Section 3(b) of the Air Commerce Act of 1926, 44 Stat. 569. The Secretary was authorized to require "full particulars" regarding the design and materials needed to construct the aircraft as a condition to registration (*ibid.*). He was expressly given discretion to accept reports from qualified persons employed by the manufacturer or to require the examination of aircraft by employees of the federal government (*ibid.*). In granting the Secretary this discretion, Congress made plain its understanding that the government was not the primary protector of civil aviation safety. As the House Report on the Act explained (House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess., *Civil Aeronautics: Legislative History of the Air Commerce Act of 1926* 34 (1928)):

It is not to be expected that Government representatives will, for instance, individually inspect each aircraft for its airworthiness from day to day. Rather, Federal inspection will take the form of seeing to it that operators install proper inspection systems of their own and of checking up from time to time the actual effect of the system used by the operator.

In the more than 50 years since the enactment of the Air Commerce Act, the basic role of the federal government with regard to inspection and certification of civil aircraft has not changed. The safety standards have become more detailed, but the concept remains that the manufacturer or operator of the aircraft retains the ultimate responsibility to make certain that the aircraft satisfies those standards. Thus, in enacting the Civil Aeronautics Act of 1938, which transferred the responsibility for regulating air safety from the Secretary of Commerce to the Civil Aeronautics Authority (CAA), "[t]he existing methods of safety regulation [were] permitted

to remain virtually as they [were] under existing law \* \* \*." H.R. Rep. No. 2254, 75th Cong., 3d Sess. 2 (1938). See also *id.* at 4.<sup>2</sup> Indeed, Congress added Section 605(a) of the Act, which "expressly makes it the duty of air carriers and their employees to comply with the regulations of the Authority regarding the inspection, maintenance, overhaul and repair of equipment." H.R. Conf. Rep. No. 2635, (Pt. 1), 75th Cong., 3d Sess. 82 (1938).

In 1958, Congress again transferred regulatory authority over aviation safety, this time to the Federal Aviation Agency. This agency later was renamed the Federal Aviation Administration (FAA) and was placed in the Department of Transportation. Pub. L. 89-670, Sections 3(c), 6(c)(1), 80 Stat. 932, 937 (1966). In the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. V) 1301 *et seq.*, as it exists today, Congress has directed the Secretary of Transportation generally "to promote safety of flight of civil aircraft" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft \* \* \*." 49 U.S.C. 1421(a) and (1). At the same time, Congress retained the provision from the 1938 Act that imposed the primary duty on "every person [in the aviation industry] engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply" with the statutory and administrative standards prescribed by the Secretary. 49 U.S.C. 1425(a). See also 49 U.S.C. 1421(b).

## 2. The FAA's Airworthiness Certification Process

In order to monitor adequately the aviation industry's compliance with the Secretary of Transportation's mini-

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<sup>2</sup> The legislation was passed primarily to consolidate in one agency the regulatory functions previously undertaken by several different agencies. In addition, Congress wanted to increase the degree of economic regulation of air carriers. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 1-2 (1938). Accordingly, the legislative history contains little discussion regarding regulation of safety in air commerce.

imum safety standards, Congress provided generally for a multi-step process for certifying the safety of aircraft. The FAA, acting as the Secretary's designee, has promulgated extensive regulations establishing minimum safety standards that must be satisfied by the designer or manufacturer of an aircraft at each step in the certification process. Each step culminates in the issuance of a certificate by the FAA; it is unlawful to operate in air commerce any aircraft that does not have a current "airworthiness certificate." 49 U.S.C. (& Supp. V) 1430(a).

Pursuant to its mandate "to promote safety of flight" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft \* \* \*" (49 U.S.C. 1421(a)), the FAA has promulgated Part 21 of the Federal Aviation Regulations (14 C.F.R.) entitled *Certification Procedures For Products and Parts*. In addition, and pursuant to the same mandate, the FAA has promulgated Parts 23, 25, 27, 29, 31, 33, and 35 of the Federal Aviation Regulations. Each of these parts concerns a specific category of aircraft or product (normal category airplanes, transport category airplanes, normal category rotorcraft, transport category rotorcraft, aircraft engines and propellers). Collectively, these parts have become known as the FAA's *Airworthiness Standards*, and in all, they account for over 500 pages of text in Title 14 of the Code of Federal Regulations.

Before introducing a new type of aircraft, a manufacturer must first obtain a "type certificate," which requires FAA approval of the basic design of the aircraft. 49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53. The manufacturer supplies the FAA with design drawings, which FAA employees or private employees who represent the agency examine for compliance with minimum safety standards. Through this process, which may take years to complete, a basic design is approved and a type certificate is issued. See generally National Academy of Sciences, Committee on FAA Airworthiness Certification

Procedures, *Improving Air Safety* 19-20 (1980) (hereinafter "NAS Report").<sup>3</sup>

The manufacturer then applies for a "production certificate" based on a prototype of the aircraft. 49 U.S.C. 1423(b); 14 C.F.R. 21.131-21.165. This certificate authorizes the manufacturer to produce copies of the prototype so long as they are identical to the "type" approved. The manufacturer must supply detailed information regarding materials used and production methods employed. 14 C.F.R. 21.143. In addition, FAA employees or designated representatives (see page 8 & note 7, *infra*) inspect the prototype and test fly it "to determine compliance with the applicable [minimum safety standards]." 14 C.F.R. 21.157.

After the manufacturer receives a production certificate, and assuming no limitations are imposed on the certificate, it may begin mass production of the approved aircraft. The manufacturer must, however, obtain an "airworthiness certificate" for each aircraft that is assembled. This requires that the aircraft be inspected by FAA employees or designated representatives of the manufacturer to determine whether the plane conforms to the prior certifications and all minimum safety standards. 49 U.S.C. 1423(c); 14 C.F.R. 21.171-21.199.

An additional certificate is required for aircraft that are altered by the introduction of a major change in the type design. 14 C.F.R. 21.113. In order to obtain a "supplemental type certificate," the applicant must supply the FAA with drawings and other data sufficient to "show that the altered product meets applicable airworthiness requirements \* \* \*." 14 C.F.R. 21.115. The FAA's re-

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<sup>3</sup> As an indication of the magnitude of the agency's task in attempting to assure that a type design complies with the hundreds of different minimum safety standards, one manufacturer estimated that in the course of obtaining a type certificate for a new aircraft it would submit to the FAA approximately 300,000 engineering drawings and changes, 2000 engineering reports and 200 vendor reports. In addition, the manufacturer would submit data from some 80 ground tests and 1600 flight test hours. See *NAS Report, supra*, at 29.

view is often limited to an examination of photographs or diagrams of the proposed change. *FAA, Order Type Certification* 31-32 (reprint 1967) (hereinafter cited as "*Handbook*").<sup>4</sup> Unlike the inspection process that is followed for other certifications (see pages 8-9, *infra*), the FAA's *Handbook* requires a physical inspection of the "prototype modification" if compliance "cannot be determined adequately from an evaluation of the technical data." *Id.* at 32. The inspections are to be conducted by "an FAA representative." *Ibid.*

With regard to conformity, the FAA's *Handbook* clearly states that "[i]t is the primary responsibility of manufacturing inspectors to determine that prototype products \* \* \* conform with drawings [and] specifications \* \* \*." *Handbook, supra*, at 39. Furthermore, the intensity of the agency's inspection varies depending on its experience with the manufacturer. For manufacturers that have a record of acceptable quality control and inspection, the FAA's "conformity determination may be made through a planned system of spot-checking \* \* \* and by reviewing inspection records and materials review dispositions." *Ibid.*<sup>5</sup>

One last certificate issued by the FAA, the Class I Export Certificate of Airworthiness, is relevant to these cases. 14 C.F.R. 21.321-21.339. This certificate, which may be obtained from the FAA upon request, informs a foreign government that a particular aircraft exported from the United States complies with the design approved by the agency and is in condition for safe operation at the time of export. The aircraft involved in the accident giving rise to the *Varig* and *Mascher* cases was exported to Brazil.

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<sup>4</sup> A copy of the FAA's *Handbook* has been lodged with the Clerk of this Court.

<sup>5</sup> Supplemental type certificates are the certificates most frequently issued by the FAA, especially with regard to general aviation aircraft. Last year the FAA issued more than 1,800 supplemental type certificates.



In light of the extensiveness and complexity of the safety standards (14 C.F.R. 23.1-23.1589) and the large number of aircraft requiring certification, the FAA is unable to monitor or inspect directly every aspect of every design, prototype or assembled aircraft. Indeed, since there are fewer than 400 engineers employed by the FAA, it is plain that they can perform only a small percentage of the inspections required for certifications. See *NAS Report, supra*, at 29. Accordingly, consistent with the statutory scheme (49 U.S.C. 1425(a)), the regulations impose upon each applicant for a certificate an obligation, *inter alia*, to "make all inspections and tests necessary to determine \* \* \* [c]ompliance with the applicable airworthiness \* \* \* requirements." 14 C.F.R. 21.33 (b) (1).<sup>6</sup> In addition, the vast majority of the FAA's inspections are performed by "designated engineering representatives," who typically are employees of the manufacturer or operator of the aircraft, but are licensed by the FAA. 14 C.F.R. 183.29.<sup>7</sup>

<sup>6</sup> 14 C.F.R. 21.33(b) provides:

*Each applicant must make all inspections and tests necessary to determine—*

- (1) Compliance with the applicable airworthiness and aircraft noise requirements;
- (2) That materials and products conform to the specifications in the type design;
- (3) That parts of the products conform to the drawings in the type design; and
- (4) That the manufacturing processes, construction and assembly conform to those specified in the type design.

<sup>7</sup> The *NAS Report* (at 29-30) explains the magnitude of the certification process and the agency's response to it:

FAA engineers cannot review each of the thousands of drawings, calculations, reports, and tests involved in the type certification process; yet the agency must be certain that each design for a new airplane meets all the regulatory requirements. The present system thus depends not only on the quality of the FAA staff but also on the assistance rendered by aircraft company employees called Designated Engineering

For each aircraft, therefore, literally dozens of inspections are conducted by different individuals—most of whom are not federal employees—with engineering expertise in a particular area.<sup>8</sup> Indeed, it is not uncommon for airworthiness certificates for mass produced aircraft to be issued without any FAA employee's ever having looked at the specific aircraft; virtually all inspections at the plant are conducted by designated representatives of the manufacturer.<sup>9</sup> *NAS Report, supra*, at 29-30. FAA representatives do no more than spot check the manufacturers' safety controls and sign the certificate based on the designated representatives' assurances that the aircraft complies with FAA standards. *Id.* at 32. The FAA-signed certificate does not indicate who conducted the various inspections performed on the different parts of the aircraft (J.A. 278).

### 3. *The United Scottish Insurance Case*

a. On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by an air taxi service doing business as Catalina Vegas Airlines, crashed three minutes after taking off from Las Vegas, Nevada en route to San Diego, California. See 614 F.2d 188, 189 (1979). The pilot, co-pilot and two passengers were killed (*ibid.*).

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Representatives (DERs) who review the design and design process to make sure, on behalf of the FAA, that all aspects of the regulations are complied with.

<sup>8</sup> The non-employee representatives are not subject to any direct FAA control, but there are spot checks of their work. See generally Dilk, *Negligence of FAA Administration Delegates Under the Federal Tort Claims Act*, 42 J. Air L. & Com. 575, 583 (1976).

<sup>9</sup> For aircraft manufactured pursuant to a previously issued production certificate, the agency's manual expressly relieves the manufacturer of the obligation to submit each airplane to an agency inspection. The manual states: "[N]or is it necessary for the FAA representative to inspect each aircraft to determine conformity with the approved type design." FAA, *Airworthiness Certification of Aircraft and Related Approvals* 30-31 (1982). A copy of this manual has been lodged with the Clerk of this Court.

The cause of the crash was an in-flight fire located in the forward baggage compartments of the airplane.

The airplane that crashed was manufactured in 1951 in the United Kingdom. At some point prior to 1965, the airplane was purchased by Air Wisconsin, another air taxi operator. In 1965, pursuant to a contract with Air Wisconsin, Aerodyne Engineering Corporation ("Aerodyne"), a large and well respected manufacturer in the aviation industry (see J.A. 234), installed a gasoline fueled heater into both the DeHavilland Dove that crashed and a sister airplane also owned by the airline (614 F.2d at 190). Aerodyne applied for a supplemental type certificate (see page 6, *supra*) to authorize the installation. Thereafter, the heater was installed by Aerodyne and, pursuant to the FAA's *Handbook*, should have been inspected by representatives of both Aerodyne and the FAA (see pages 6-7, *supra*; J.A. 233-234). The supplemental type certificate was issued in 1965.<sup>10</sup>

In 1966, the airplane was sold to respondent Dowdle, who owned Catalina-Vegas Airlines. Dowdle sent a mechanic to Wisconsin to check out the airplane; relying in part on the supplemental type certificate as an indication of the airworthiness of the airplane, Dowdle's mechanic recommended that the plane be purchased (J.A. 229). Between 1966 and the crash in 1968, Dowdle's employees inspected the aircraft on at least eight different occasions, including two major yearly inspections of the gasoline heater (J.A. 232-233).

b. *The First Trial and Appeal.* In the wake of the crash, five law suits were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp.

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<sup>10</sup> The record fails to establish either who inspected the installation or even if there actually was an inspection. Accordingly, there is no evidence reflecting the quality of the inspection. The evidence at trial indicated only that an employee of the FAA signed the final certificate and that he relied on the FAA's general practices to ensure that there had been a compliance inspection (J.A. 280).

V) 2671 *et seq.*, in the United States District Court for the Southern District of California. Three suits for wrongful death were filed by the estates of victims of the accident; one suit for property damage to the De-Havilland Dove was filed by respondent Dowdle, the owner of the air taxi service; and one suit for monies paid for liability coverage on behalf of the owner of the plane was filed by a group of insurance companies.<sup>11</sup>

After trial, the district court entered judgment for respondents. The court found that the crash occurred because the gasoline line leading to the heater was not adequately clamped to reduce vibration (J.A. 309-310). The court concluded that the excessive vibration, coupled with a faulty connection in the line between copper and stainless steel tubing, allowed the gasoline to leak and ignite (J.A. 314-315). Relying upon 14 C.F.R. 23.993, which requires fuel lines to have sufficient support to "prevent excessive vibration," the court held that the aircraft was not airworthy as "supplemented" and that the government was negligent in certifying an installation that did not comply with its regulations. The district court also found no contributory negligence on the part of any of the respondents.<sup>12</sup>

The court of appeals reversed (614 F.2d 188 (1979)). The court of appeals held that the district court erred in ruling that a federal statutory duty "automatically give[s] rise to a duty of care to which a state's negligence per se doctrine would be applied" (*id.* at 193). Rather, because the United States is liable only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, "[t]he crucial inquiry is

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<sup>11</sup> Respondents Fleming and Cearley settled claims against Catalina-Vegas Airlines for a total of \$100,000 received from its insurer. Law suits on behalf of respondents also were filed in Texas state court against Aerodyne. Those suits apparently are still pending.

<sup>12</sup> The district court subsequently awarded a total of \$200,000 in damages against the United States.

whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created—the good samaritan rule” (614 F.2d at 194). The court of appeals expressly declined (*id.* at 190) to consider contentions that respondents’ suits were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h), and instead remanded the case to the district court to determine whether the evidence was sufficient to support a finding of liability under the good samaritan doctrine.

c. *The District Court’s Decision on Remand.* On remand, the district court, after taking additional testimony,<sup>13</sup> again entered judgment in favor of respondents. The court, applying California law (82-1350 Pet. App. 11a), found that California courts have recognized tort liability under the good samaritan rule as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965).<sup>14</sup> Although the district court was “reluc-

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<sup>13</sup> Respondent Dowdle’s mechanic testified that he relied upon the supplemental type certificate in deciding whether to approve the airplane for purchase (J.A. 229). Respondent Cearley testified that her husband, a passenger on the plane, was aware of the government’s regulatory efforts to make air travel safe (J.A. 238-239).

<sup>14</sup> Section 323 of the *Restatement* provides:

One who undertakes, gratuitously or for consideration, to render services to another, which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other’s reliance upon the undertaking.

Section 324A of the *Restatement* provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from

tant to conclude [that] the government's inspection increased the risk of harm in 'some positive way' " (82-1350 Pet. App. 14a, quoting *Blessing v. United States*, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978)), it determined that the United States was liable under the good samaritan rule because respondents "have demonstrated the requisite degree of reliance on the government's inspection and certification. The task of inspection, which is undertaken to protect passengers, is relied upon by such individuals, and if it is negligently performed, it gives rise to the very dangers it was intended to prevent" (82-1350 Pet. App. 14a).

d. *The Court of Appeals' Decision.* The court of appeals affirmed (82-1350 Pet. App. 1a-6a). The court held (*id.* at 3a) that the government had performed a "service" to decedents and the airline owner within the meaning of the good samaritan doctrine because "the F.A.A.'s regulatory activities are performed for the public as a whole" and "[w]hen voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others." The court also concluded that, "[h]aving chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (*id.* at 3a-4a).

Having found that the district court properly imposed liability on the government under state tort law, the court of appeals considered whether respondents' claims were barred by either the misrepresentation or discretionary function exceptions to the Tort Claims Act. The

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his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

court ruled that the misrepresentation exception did not bar this action because "[t]he basis of the [respondents'] claim \* \* \* is not the misrepresentation or misinformation contained in the certificate, but the negligence of the F.A.A.'s inspection on which the airworthiness certificate was issued" (82-1350 Pet. App. 4a-5a). The court also held that the discretionary function exception was inapplicable because, in light of the detailed FAA regulations, there was "no room for policy judgment" in the inspection and certification of the aircraft (*id.* at 5a-6a).

Judge Chambers concurred (82-1350 Pet. App. 6a), stating that "[m]ost of us thought when the Federal Tort Claims Act was passed that the discretionary exception \* \* \* would preclude recovery on the facts of the two cases we decide today, but the developing law seems to have overtaken us." Judge Chambers did not cite the "developing law" upon which he relied.

#### 4. *The Varig Airlines and Mascher Cases*

a. These consolidated cases involve the crash of a Boeing 707 airplane, which was designed, manufactured, tested, inspected and assembled by the Boeing Company (82-1349 Pet. App. 9a). The Civil Aeronautics Agency (CAA), a predecessor of the Federal Aviation Administration, was responsible for ensuring that the designs, plans, specifications and performance data for the Boeing 707 aircraft were inspected for conformity to the agency's minimum safety standards. The CAA issued a type certificate in 1958, 15 years prior to the accident at issue here (*ibid.*).

Boeing sold the airplane to Seaboard Airlines for domestic use. In 1969, Seaboard resold the plane to respondent Varig Airlines, a Brazilian commercial air carrier (*ibid.*).<sup>15</sup> At that time the airplane was removed

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<sup>15</sup> There is no evidence that an Export Certificate was ever requested by or issued to respondent Varig or the appropriate Brazilian agency. J.A. 105; see page 7, *supra*.



from the United States Civil Aircraft Registry and placed on the Brazilian registry (14 C.F.R. 21.335(e) (1); J.A. 103-104). Consequently, the FAA airworthiness certificate previously issued to the airplane became invalid and, indeed, was no longer required by federal law so long as the plane did not fly within the airspace of the United States (*ibid.*). The ultimate responsibility for regulating the airworthiness of the airplane then rested with the state of registry (in this case, Brazil). See 49 U.S.C. (& Supp. V) 1401 and 1508(b).

On July 11, 1973, the Boeing 707 airplane crashed while on a commercial flight from Rio de Janeiro to Paris, France (82-1349 Pet. App. 8a). A few minutes before the scheduled arrival at Orly Airport, a fire broke out in one of the aft lavatories (82-1349 Pet. App. 2a). Thick, black smoke quickly filled the entire cabin and cockpit area and caused the airplane to make a crash landing into a field a few miles from the airport (*ibid.*). All but 11 of the 135 persons aboard died from asphyxiation caused by inhaling toxic gases (*ibid.*). A post-impact fire consumed most of the air fuselage, including the aft lavatory structure and most of the floor and cargo area beneath and forward of the aft lavatories.

b. *The District Court Proceedings.* Following the accident, two consolidated actions were filed against the United States under the FTCA in the United States District Court for the Central District of California. The *Varig Airlines* suit involved a claim for damages for the destroyed Boeing 707. The *Mascher* suit involved claims for wrongful death brought by families and personal representatives of 62 passengers.<sup>16</sup>

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<sup>16</sup> Representatives of the passengers also brought suit in New York state court against Boeing Company, Seaboard World Airlines, and five subcomponent manufacturers. These suits were settled in 1977. In addition, claims on behalf of the victims were filed against respondent Varig, but under the provisions of the Warsaw Convention, Varig's liability in the event of the death of a passenger was limited to \$10,000 per passenger.

Varig Airlines brought a separate action against Boeing and a subcomponent manufacturer in the United States District Court for

Respondents claimed that the pre-impact fire originated in the towel disposal area located below the sink unit of one of the aft lavatories of the airplane and was caused either by an electrical malfunction or by passenger carelessness. They alleged that the towel disposal area was not capable of containing fire as required by agency regulations and that the CAA was negligent in its inspection of the plane and issuance of a type certificate for the Boeing 707 in 1958—15 years prior to the crash.<sup>17</sup>

The district court entered summary judgment for the United States (82-1349 Pet. App. 8a-13a). The court first noted that the Federal Tort Claims Act subjects the United States to liability only where a private person would be liable in "like circumstances" (*id.* at 10a); the court held that California law does not recognize a duty giving rise to liability in tort for inspection and certification activities (*id.* at 10a). The court further held that the FAA's inspection and certification responsibilities were regulatory functions, not operational services, and "[did] not give rise to an actionable duty in tort under California law" that extended to respondents

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the Central District of California. The district court granted summary judgment for the defendants and the court of appeals affirmed. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. Boeing*, 641 F.2d 746 (9th Cir. 1981).

<sup>17</sup> The applicable regulation, CAA § 4b.381 and (d), provided (quoted in 82-1349 Pet. App. 3a):

*Cabin Interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

\* \* \* \* \*

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

No identical provisions exist in the FAA's regulations, but they do require that each compartment to be used by the crew or passengers must be made of flame resistant materials. 14 C.F.R. 23.853.

(*ibid.*). Specifically, the district court ruled that "the benefits of [the FAA's inspections] flow to the general public at large and not to any individual so as to render the United States liable for negligence in their performance" (*id.* at 11a) and that the FAA's actions did not relieve respondent Varig of the primary responsibility for the safety of the plane (*id.* at 12a).

Although the district court found no basis for imposing liability on the government based on any tort theory, it nevertheless held that respondents' claims also were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h) (82-1349 Pet. App. 12a).

c. *The Court of Appeals' Decision.* The court of appeals reversed (Pet. App. 1a-7a). Employing reasoning akin to that adopted by the same panel in its opinion issued the same day in the *United Scottish Insurance* case, the court ruled that the United States could be held liable under the good samaritan doctrine, as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965) (see note 14, *supra*). In the court's view, the government had performed a "service" to respondents within the meaning of the doctrine because "the United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft" (82-1349 Pet. App. 5a). The court concluded in addition that the reliance element of the doctrine had been satisfied because, having issued regulations "designed to insure optimum safety," the government "should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify" (*ibid.*). The court made no mention of the significance, if any, of the fact that all of the passengers on the aircraft were foreign residents or that respondent Varig had never attempted to obtain an export certificate of airworthiness.

The court of appeals ruled that the misrepresentation exception in 28 U.S.C. 2680(h) did not bar this action

because "[respondents'] claims \* \* \* arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate" (82-1349 Pet. App. 6a). Finally, the court of appeals rejected the discretionary function exception in 28 U.S.C. 2680(a) as a bar to respondents' suit because "[t]he kind of discretion contemplated by the exemption clause does not exist in certifying compliance with F.A.A. safety regulations" (*id.* at 6a-7a).<sup>18</sup>

## SUMMARY OF ARGUMENT

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A. When Congress in 1946 took the "radical" step of waiving the sovereign immunity of the United States for suits alleging negligence by federal employees, it decided to proceed cautiously for fear of causing an untoward disruption of the conduct of governmental affairs. Among the principal limitations placed on the waiver was that the United States may be sued only in circumstances where a private person could be held liable. 28 U.S.C. 1346(b) and 2674. Congress intended this limitation to exclude liability for the class of torts involving a "governmental function," and this Court recognized this congressional intent in cases decided shortly after the Federal Tort Claims Act was enacted. See *Feres v. United States*, 340 U.S. 135, 141 (1950); *Dalehite v. United States*, 346 U.S. 15 (1953).

Although the Court has held that the "private person" limitation is satisfied by a variety of government operational activities (see, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (operating a lighthouse); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (fighting a forest fire)), those activities are fundamentally different from the FAA's aircraft certification function. Certification of goods entering the channels of in-

<sup>18</sup> Judge Chambers' concurring opinion in *United Scottish Insurance* also applied to this case (692 F.2d at 1212). See page 14, *supra*.

terstate commerce, as a means of protecting the public health and safety, is the essence of the government regulatory and law enforcement process. Such activities have no counterpart in the private sector. Thus, they may not form the basis for tort liability under the Act.

B. The court of appeals acknowledged that no private person assumes responsibilities comparable to those of the FAA. The court concluded, however, that the United States could be held liable under the good samaritan doctrine, as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965). This tort theory has no application to the regulatory functions of the FAA.

First, the FAA did not undertake to perform a direct service for respondents or any other specific individual. The agency's mandate is to promote the safety of the public as a whole by enforcing minimum safety standards. Second, any service performed by the FAA was not necessary to protect respondents' safety. Airline manufacturers and operators have the primary responsibility for ensuring that their equipment is in working order. Finally, respondents did not and could not reasonably rely to their detriment upon the FAA's certification. It is not enough under the good samaritan doctrine that respondents were aware generally that the FAA has regulatory duties involving safety of aircraft; they must have foregone alternatives to protect themselves as a consequence of their awareness of the agency's actions. In sum, the relationship between respondents and the FAA is too remote to create a duty of care under the good samaritan doctrine.

## II.

Respondent's claims also are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). This exception, like the private person limitation, is intended to insulate the United States from "liability arising from acts of a government nature or function," or involving judgmental decision-making. *Dalehite v. United States*, 346 U.S. 15, 26 (1953).

The court of appeals erred in concluding that the FAA's certification process is merely a ministerial check of the aircraft to ascertain compliance with inflexible safety standards. To the contrary, the agency's responsibilities in issuing a certificate are permeated with discretionary determinations. First, the FAA must decide, in light of available resources and other considerations, whether to examine a particular aircraft, or instead to rely on the manufacturer's representation that it complies with the minimum safety standards. Second, in the event that the FAA actually examines an aircraft, it must make complicated scientific and engineering judgments whether the design or manufacture complies with numerous standards that have been drafted to allow design flexibility.

The fatal flaw in the court of appeals' analysis is the unwarranted assumption that the FAA checks every aircraft for compliance with every safety standard. But resource and other limitations preclude that regulatory approach, and the FAA's inspection manuals in fact expressly grant discretion to spot check an airplane, or to rely on a manufacturer's assurances and safety record. In essence, respondents contend that the FAA should have performed a more painstaking inspection prior to issuing certificates to the specific aircraft involved here. This claim ultimately depends on the assertion that the FAA abused its discretion to choose among reasonable regulatory alternatives by not checking these particular airplanes more thoroughly.

### III.

Respondents' lawsuits arise out of the basic claim that they purchased or traveled on defective aircraft in reliance upon a certificate of airworthiness negligently issued by the FAA many years earlier. Such claims state the traditional and commonly understood tort of negligent misrepresentation (see *Restatement (First and Second) of Torts* § 311 (1934 & 1965)) and accordingly may not be maintained against the United States in light of the "misrepresentation" exception to the Federal Tort

Claims Act, 28 U.S.C. 2680 (h). The court of appeals concluded that respondents' claims were based on the FAA's negligent inspection rather than misrepresentation. But, as the Court held in *United States v. Neustadt*, 366 U.S. 696 (1961), a claim of negligent inspection is part of the tort of negligent misrepresentation, when the injury flows from the plaintiff's reliance on the erroneous communication that is the product of the inspection.

*Block v. Neal*, No. 81-1494 (Mar. 7, 1983), does not support the decision below. That case involved an alleged breach of duty by the Farmers Home Administration to supervise construction of a home it financed, because a negligent inspection failed to discover defects that the agency might have corrected. Here, by contrast, respondents are far removed from the certification determination, because they neither manufactured nor owned the aircraft at the time of the FAA's inspection, and they could rely, if at all, only on the FAA's issuance of a certificate.

## ARGUMENT

### I. THE FEDERAL AVIATION ADMINISTRATION'S FAILURE TO DISCOVER A SAFETY DEFECT WHILE CARRYING OUT ITS REGULATORY DUTY OF CERTIFYING THE AIRWORTHINESS OF AIRCRAFT IN COMMERCIAL AVIATION DOES NOT RENDER THE UNITED STATES LIABLE FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT AS "A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES"

#### A. The FAA's Inspection And Certification Process Is A Governmental Function, Which Congress Did not Intend To Subject To Tort Liability

1. The waiver of sovereign immunity in the Federal Tort Claims Act is subject to a significant limitation: the United States may be found liable only in circumstances where liability would be imposed on a private individual under state law. See 28 U.S.C. 1346(b) and 2674. In this way, Congress intended to make the federal government amenable to suit for "ordinary common-law torts"



(*Dalehite v. United States*, 346 U.S. 15, 28 (1953) (footnote omitted)) ; indeed, the legislative history of the FTCA is devoted almost exclusively to discussions regarding the need to supply a judicial remedy for automobile accidents involving government employees who drive negligently in the course of their employment.<sup>19</sup>

Despite the restricted scope of this waiver of sovereign immunity, the FTCA was regarded as "a radical innovation," which prompted Congress to proceed cautiously. *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940). Accordingly, Congress made plain its intention that the Act should not extend to suits against the United States based on "that class of tort on the part of the Government which has to do with a governmental function, so to speak." 86 Cong. Rec. 12021 (1940) (remarks of Rep. Gwynne).

This Court recognized the limited nature of Congress' waiver of sovereign immunity in the earliest decisions interpreting the Tort Claims Act. In *Feres v. United States*, 340 U.S. 135, 141 (1950), the Court held that the

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<sup>19</sup> See, e.g., 67 Cong. Rec. 11092, 11100 (1926) (remarks of Reps. Celler, Underhill); 69 Cong. Rec. 2192, 3118 (1928) (remarks of Reps. Lozier, Box); *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 16 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 27-28 (1940); *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 37, 39, 66 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. (1940); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946). The Tort Claims Act was adopted in 1946 after more than 20 years of congressional consideration. This Court has recognized that legislative statements made with regard to earlier versions of the FTCA are useful in understanding the meaning of the Act as eventually passed. *Dalehite v. United States*, 346 U.S. 15, 2c-30 (1953).

Act does not waive sovereign immunity in situations where there is no liability for private individuals "even remotely analogous to that which [plaintiffs] are asserting against the United States."<sup>20</sup> The Court reemphasized the point three years later in *Dalehite v. United States*, *supra*, 346 U.S. at 32, when it explained that "Congress exercised care to protect the Government from claims, however negligently caused, that affected governmental functions." Thus, this Court has acknowledged that Congress, by providing the "private person" limitation as a condition to recovery, intended not only to adopt state law as the rule of decision for imposing tort liability (see *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)), but also to preserve inviolate from tort suits a core of governmental activities that are never engaged in by private citizens.<sup>21</sup>

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<sup>20</sup> Another factor in *Feres v. United States*, *supra*, persuaded the Court that Congress did not intend to waive sovereign immunity in the circumstances of that case. The Court pointed to the need for uniform rules to govern federal activities that occur nationwide and the incongruity of subjecting military affairs to the vagaries of tort law in the different states. Similarly, here, Congress enacted a scheme designed to create a uniform set of aviation safety standards. Tort litigation in various localities will necessarily impair uniformity in the minimum standards. Compare *George v. United States*, 703 F.2d 90, 91-92 (4th Cir. 1983) (copper and stainless steel coupling is not a safety defect), with *J.A.* 314-315 (copper and stainless steel coupling is a defect). Indeed, under the conflict of laws ruling by the district court in *United Scottish Insurance* (82-1350 Pet. App. 10a), it is impossible to predict what legal standard might be applied to any given inspection. The inspections in that case took place, if at all, in Texas and thus that State's tort law would seemingly apply. But the district court decided that Texas would adopt California law because respondents resided in California and purchased their airplane tickets there. Since the governing law to be applied turns on such fortuity, uniformity in inspection standards is plainly unattainable.

<sup>21</sup> The "discretionary function" exception to the Tort Claims Act, 28 U.S.C. 2680(a), provides comparable, and to a certain extent overlapping, protection against suits challenging regulatory activities, thus emphasizing Congress' concern that the United States

To be sure, this Court has declined on occasion to apply the private person limitation so as to insulate certain governmental activities from suit. In *Indian Towing Co. v. United States*, *supra*, the Court held that the Coast Guard's negligent operation of a lighthouse that caused a boat to run aground was not exempt from liability as a uniquely governmental activity. In addition, the Court rejected similar claims with regard to Forest Service firefighting activities (*Rayonier, Inc. v. United States*, 352 U.S. 315 (1957)) and the Bureau of Prison's efforts to care for inmates at a federal correctional facility (*United States v. Muniz*, 374 U.S. 150 (1963)). Critical to each of those cases, however, was the fact that the government agency involved had assumed direct, operational responsibility for the activity that caused the injury. The analogy between claims based on these kinds of operational activities and those that Congress had uppermost in its mind in adopting the Tort Claims Act—suits alleging negligence by government employees in operating a motor vehicle—is quite close. Indeed, the Court in *Indian Towing*, in discussing a hypothetical case, expressly compared negligent operation of an automobile to the negligent operation of a lighthouse and concluded that there was no “rational ground . . . why there should be any difference in result[.]” 350 U.S. at 66.

But there is an obvious and fundamental difference between driving a car and the government's quintessentially sovereign function of inspecting an aircraft for the purpose of certifying whether it may lawfully use the nation's airspace. Regulatory conduct such as that performed by the FAA is engaged in solely by the government; thus, if the immunity for governmental functions, which Congress expressly intended to preserve, is to have any meaning, it must be applicable where, as here, the

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not be held liable in damages for engaging in core governmental activities. As explained below, we also believe that these suits are barred by that provision. See pages 42-46, *infra*.

government performs its unique law enforcement role over private industry.<sup>22</sup>

The actions of a government agency in enforcing health and safety legislation pursuant to a program of inspection and certification have no counterpart in the private sector. Unlike private testing laboratories, which certify the quality of a product at the request and for the benefit of a particular customer,<sup>23</sup> the government inspects and certifies for the purpose of protecting the general public, by eliminating defective or dangerous instrumentalities from the channels of interstate commerce. As we have explained, the FAA is required "to promote safety of flight of civil aircraft in air commerce" (49 U.S.C. 1421(a)), and, in prescribing standards, rules and regulations, and in issuing certificates, the FAA must "give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest" (49 U.S.C. 1421(b); emphasis added). By the same token, the FAA may grant exemptions from applicable rules and regulations if it

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<sup>22</sup> It is unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (49 U.S.C. 1430(a)(1)). FAA inspection and certification, therefore, are integral steps in a program of law enforcement rather than a service performed for a particular airline or air passenger. See *Federal Aviation Act: Hearings on H.R. 12616 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 329 (1958).

<sup>23</sup> See generally Note, *Liability of Certifiers of Quality to Ultimate Consumers*, 36 Notre Dame Law. 176, 183 (1961); Note, *Tort Liability of Independent Testing Agencies*, 22 Rutgers L. Rev. 299, 325-326 (1968); Note, *Liability of a Testing Company to Third Parties*, 1964 Wash. U.L.Q. 77, 96-97. Indeed, California has recognized that such laboratories may be liable for negligently certifying the safety of a product. See *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519, 521 (Ct. App. 1969). The basis for liability was, however, "negligent misrepresentation," which is expressly excluded from the waiver of sovereign immunity in 28 U.S.C. 2680(h). See *United States v. Neustadt*, 366 U.S. 696 (1961), and pages 46-50, *infra*.

"finds that such action would be *in the public interest*" (49 U.S.C. 1421(c); emphasis added). When the FAA breaches these obligations by issuing an unwarranted certificate, it has breached its governmental responsibilities to the general public, not any duty of care to an individual. The remedy for such breach is corrective administrative action or modification of the agency's duties by Congress, not judicial review through tort litigation brought by private plaintiffs.

It is simply inconceivable that Congress, when it enacted the Tort Claims Act with an intention to protect from suit certain core governmental, regulatory activities and to move cautiously because of the radical nature of the Tort Claims Act concept (see page 22, *supra*), meant to waive sovereign immunity for claims based on administrative inspection and certification activities.<sup>24</sup> Inspection and certification are the lifeblood of the administrative process; "[l]icensing is [a] widely used regulatory technique that is characteristically employed . . . to enforce minimal qualification . . . ." S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 4 (1979). Numerous agencies of the federal government have inspection and/or certification authority and virtually every business that engages in interstate commerce is subject to some form of federally-administered certification or licensing requirement. To name just a few, the Nuclear Regulatory Commission inspects nuclear reactors,<sup>25</sup> the Food and Drug Administration inspects and

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<sup>24</sup> Needless to say, not a word in the voluminous legislative history of the FTCA supports such a result. Compare *United States v. Muniz*, *supra*, 374 U.S. at 153-158.

<sup>25</sup> 42 U.S.C. 2201(o). Indeed, there is now pending a Tort Claims Act suit for \$4 billion arising out of the NRC's regulatory activities with regard to the Three Mile Island nuclear reactor. See *General Public Utilities Corp. v. United States*, 551 F. Supp. 521 (E.D. Pa. 1982). The government's motion to dismiss the complaint was denied on grounds similar to those relied on by the court below. The United States Court of Appeals for the Third Circuit has granted our petition for an interlocutory appeal (No. 83-1017).

certifies the safety of drugs and food,<sup>26</sup> the Federal Deposit Insurance Corporation inspects the financial records of federally-insured banks,<sup>27</sup> the Occupational Safety and Health Administration inspects the safety and health conditions of most work environments,<sup>28</sup> and the Mine Safety and Health Administration inspects the safety and health conditions of mines.<sup>29</sup>

<sup>26</sup> 21 U.S.C. (& Supp. V) 374. See *Anglo-American & Overseas Corp. v. United States*, 144 F. Supp. 635 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 236 (2d Cir. 1957).

<sup>27</sup> 12 U.S.C. (Supp. V) 1820(b). See *First State Bank v. United States*, 599 F.2d 558 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

<sup>28</sup> 29 U.S.C. 657. See *Davis v. United States*, 536 F.2d 758 (8th Cir. 1976), *aff'g* 395 F. Supp. 793 (D. Neb. 1975).

<sup>29</sup> 30 U.S.C. (Supp. V) 813. See *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

Of course, the list in the text only touches the surface. A cursory examination of the regulatory activities of several government agencies reveals an extraordinary array of inspection and certification activities. See, e.g., 42 U.S.C. (& Supp. V) 1472 (Farmers Home Administration inspects homes built with financial assistance provided by the agency, see 7 C.F.R. 1804.4(d)); 7 U.S.C. (& Supp. V) 77 (Department of Agriculture inspects and certifies grain shipped from the United States to a foreign jurisdiction); 21 U.S.C. 455 (Department of Agriculture inspects poultry products); 21 U.S.C. (Supp. V) 603 (Department of Agriculture inspects "all cattle, sheep, swine, goats, horses, mules and other equines" before slaughtering, packing, or meat-canning); 7 U.S.C. (Supp. V) 150ff (Department of Agriculture inspects for plant pests persons or articles transported into this country); 21 U.S.C. 693 (Department of Agriculture inspects and certifies dairy products intended for export); 33 U.S.C. (& Supp. V) 1318 (Environmental Protection Agency inspects premises where an effluent source is located); 15 U.S.C. 2610 (Environmental Protection Agency inspects premises where work with chemical substances is performed); 7 U.S.C. 136g (Environmental Protection Agency inspects establishments where pesticides are distributed or sold); 42 U.S.C. (Supp. V) 6927 (Environmental Protection Agency inspects hazardous waste facilities); 45 U.S.C. 23 (Department of Transportation inspects locomotives, see *Norfolk & W.Ry. v. Brotherhood of Locomotive Engineers*, 459 F. Supp. 136, 143-44 (W.D. Va. 1978); 46 U.S.C. 39 (Coast Guard inspects and

The potential liability of the United States for failure to uncover defects or improprieties pursuant to these and other regulatory inspections is staggering. In the case of aircraft certifications alone, the United States would be amenable to suit whenever an accident caused by mechanical failure occurred anywhere in the world, if the airplane involved had at any time been inspected by the FAA.<sup>30</sup> And this liability could be imposed without the slightest evidence that the United States acted unreasonably in conducting its inspection. Negligence in *United Scottish Insurance* was based solely on *res ipsa loquitur*, and negligence in *Varig Airlines* and *Mascher* would necessarily be based on the same theory. Proof of actual fault cannot be established. While reliance on *res ipsa loquitur* in a particular FTCA case is certainly permissible, it is most unlikely that Congress intended to waive

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certifies biennially the hull and equipment of cargo barges over 100 gross tons); 15 U.S.C. (& Supp. V) 1401 (Department of Transportation inspects facilities manufacturing or introducing motor vehicles into commerce, see 49 C.F.R. 554.1 *et seq.*); 49 U.S.C. (& Supp. V) 1680, 1681(c) (Department of Transportation inspects pipeline facilities); 33 U.S.C. 1512 (Department of Transportation inspects deepwater ports); 33 U.S.C. 467a (Department of Army inspects dams); 38 U.S.C. 642 (Veterans Administration inspects state nursing care homes); 18 U.S.C. 923(g) (Department of Treasury inspects firearms or ammunition kept by importers, manufacturers, dealers and collectors); 21 U.S.C. 44 (Department of Health and Human Services inspects teas entering the United States); 15 U.S.C. 2065 (Consumer Product Safety Commission inspects establishments manufacturing, holding or transporting consumer products in commerce, see 16 C.F.R. 118.1 *et seq.* (1982), 1605.1 *et seq.*; and 42 U.S.C. (& Supp. V) 5413 (Department of Housing and Urban Development inspects the construction of mobile homes).

<sup>30</sup> The Sixth Circuit recognized this in *Garbarino v. United States*, 666 F.2d 1061, 1066 (1981): "[T]o extend the Government's liability to situations involving the alleged negligent issuance of safety inspection certificates \* \* \* would be to make the Government a joint insurer of all activity subject to safety inspections." The facts of the *Varig Airlines* and *Mascher* cases show that this concern is not farfetched. There, the FAA inspection took place in 1958; the accident occurred on a flight by a foreign air carrier from Brazil to France in 1973.



sovereign immunity in a broad class of cases where virtually no specific proof of negligence or wrongful conduct by a federal employee will ever be available. Cf. *Laird v. Nelms*, 406 U.S. 797 (1972) (no recovery for strict liability under FTCA); *Dalehite v. United States*, *supra*, 346 U.S. at 44 (same).

We submit that Congress, by limiting the government's liability to that of a private person, did not intend to expose the United States to monetary liability, essentially as an insurer, as a result of certifications and inspections undertaken by administrative agencies to enforce compliance by private industry with mandatory health and safety requirements. To the contrary, this is precisely the sort of core governmental activity—law enforcement—that has no analogy in private tort litigation and that therefore was excluded from the limited waiver of sovereign immunity in the FTCA.

#### **B. The State Law Duty Embodied in the Good Samaritan Doctrine Cannot Be Applied to the FAA's Inspection and Certification Process**

Notwithstanding the uniquely governmental nature of the FAA's inspection and certification process, the court of appeals concluded that the United States' liability "as a private person" under the Tort Claims Act could be predicated on the good samaritan doctrine of tort law, adopted by California as set out in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965) (see note 14, *supra*). The court of appeals' Procrustean effort to fit the FAA's certification process into the framework of the good samaritan doctrine, however, merely reinforces our submission that this law enforcement function is simply not a suitable basis for imposing tort liability.

##### **1. The FAA Did Not Perform A Necessary Service For Respondents**

In order to recover under Sections 323 and 324A of the Restatement, the plaintiff must first demonstrate that the defendant undertook to render a *service* to another, which

was *necessary* for the other's protection. The court of appeals' conclusion (82-1350 Pet. App. 3a) that "[w]hen voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others" fails to recognize the crucial distinction between the FAA's conduct and that of the traditional good samaritan recognized by state tort law. To satisfy the good samaritan doctrine, it must be shown that "the purpose of the action was to render a *direct* service to the person who was harmed, or to persons of that class." *Roberson v. United States*, 382 F.2d 714, 720 (9th Cir. 1967) (emphasis added). See also *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982); *Evans v. Liberty Mutual Insurance Co.*, 398 F.2d 665, 666-667 (3d Cir. 1968). For instance, the doctrine applies where an employer undertakes to transport an ill employee to her home and does so negligently. See *Restatement (Second) of Torts* § 323 comment c, illustration 1. Other common examples are (382 F.2d at 720) :

an employer gratuitously furnished medical aid to an employee, and was negligent in selecting a physician, *Vesel v. Jardine Mining Co.*, 110 Mont. 82, 100 P.2d 75, 127 A.L.R. 1093; a water company gratuitously removed a meter and left the plaintiff's premises in a dangerous condition, *Walsh v. Hackensack Water Co.*, 181 A 422, 13 N.J. Misc. 815; a landlord gratuitously undertook to repair a water pipe and did so in a negligent manner, *Tarnogurski v. Rzepski*, 252 Pa. 507, 97 A 697.

The activities performed by the FAA are far removed from these examples or from other situations contemplated by the good samaritan doctrine. As one court has accurately explained (*Grogan v. Commonwealth of Kentucky*, 577 S.W.2d 4, 5 (Ky. 1979) (citation omitted)) :

[I]n the enactment of laws designed for the public safety a governmental unit does not undertake to perform the task; it attempts only to compel others to do it, and as one of the means of enforcing that

purpose it may direct its officers and employees to perform an inspection function. The failure of its officers and employees to perform that function does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others by reason of such default.

The FAA's mandate is to promote the safety of the public as a whole by enforcing minimum safety standards. Congress made it unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (49 U.S.C. 1430(a)(1)) and authorized the FAA to adopt an inspection and certification process as integral steps in a program of law enforcement (see pages 4-9, *supra*). The FAA's function is designed to encourage private entities to comply voluntarily with minimum safety standards, and, if possible, to prohibit those who fail to comply from using our airspace. Manufacturers and operators of commercial aircraft are *regulated* by the FAA; the FAA does not perform an inspection service for their benefit, any more than the Internal Revenue Service performs an audit for the benefit of a taxpayer. By the same token, the general flying public undoubtedly is an incidental beneficiary of the FAA's enforcement activities, just as the general public is a beneficiary of all governmental regulatory activities; but the FAA does not purport to act as a private testing service for each passenger.

The inapplicability of the good samaritan tort doctrine to the FAA's certification process is perhaps best demonstrated by comparing the instant cases to the California cases relied upon by the district court in *United Scottish Insurance*. In *Coffee v. McDonnell-Douglas Corp.*, 8 Cal. 3d 551, 125 Cal. Rptr. 358, 503 P.2d 1366 (1972), the court held that an employer was liable for injuries caused by its failure to inform plaintiff that a blood test the employer had voluntarily administered to plaintiff indicated the presence of a potentially serious illness. The court did not hold that the employer was under a duty to discover

the disease, but only that given its relationship to the employee, the employer had a duty to disclose any "dangerous condition revealed in a physical examination." 8 Cal. 3d at 559.

The other two cases are even more distantly related. *Schwartz v. Holmes Bakery Limited*, 67 Cal.2d 232, 60 Cal. Rptr. 510, 430 P.2d 68 (1967), involved a claim for personal injury caused by a bakery truck driver who negligently instructed a 14-year-old customer on how to approach the truck. And, in *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), an employer was held liable for allowing a minor employee to become intoxicated and then to drive home alone.

All of those cases are obviously distinguishable from the instant cases in several significant respects. To begin with, there is a major difference in the directness of the relationship between the parties, which necessarily affects the duty of the defendant. See W. Prosser, *Handbook of the Law of Torts* 324 (4th ed. 1971) (duty depends on "the relationship between individuals which imposes on one a legal obligation for the benefit of the other"). In *United Scottish Insurance*, the FAA certified Aerodyne's installation of a heater in an airplane owned by Air Wisconsin. Years later, Air Wisconsin conveyed the airplane to Catalina-Vegas; the subsequent airplane accident caused property damage to respondent Dowdle, who owned Catalina-Vegas, and personal injury to the passengers. The relationship between the FAA and the injured parties in *Varig Airlines* and *Mascher* is even more remote. The FAA issued an airworthiness certificate to Boeing, which sold the airplane to Seaboard, which sold the plane to Varig; the airplane accident occurred 15 years after the allegedly negligent action and caused property damage to Varig and personal injury to its passengers.

Respondents have cited no case in which a private person has been held liable for gratuitous conduct that caused injuries so far removed from the alleged negligent act. In the California cases, the duties were created because of the direct, personal services that were provided and relationships that existed between the parties—employ-

ers and employees, merchants and customers, responsible adults and dependent minors; more important, in each of these cases the defendant acted negligently in his dealings *with the plaintiff*. By contrast, the FAA has no comparable relationship with respondents, and respondents had absolutely no interest in the airplanes at the time of the allegedly negligent inspections. See also page 38, *infra*.<sup>31</sup>

Moreover, it is plain that the FAA's inspections were not "necessary" to protect anyone. In the foregoing examples from California law, once the defendant chose to perform a service for the plaintiff, the defendant's due care was essential to protect the plaintiff from harm. Under the Federal Aviation Act, however, the manufacturer and operator of an aircraft retain the primary responsibility (49 U.S.C. 1425(a)) to insure compliance with FAA standards, regardless of the nature or extent of an FAA inspection, and this includes an express duty to inspect their own equipment. An accident caused by the breach of *those* duties gives rise to liability. See notes 11, 16, *supra*. The FAA, on the other hand, merely possesses the governmental authority to check on the manufacturer's and operator's work; it does not attempt to review every detail in the applicant's submission. Indeed, as noted above (see pages 7, 9, *supra*), the FAA's internal operating rules expressly permit the agency to issue

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<sup>31</sup> Respondents in *United Scottish Insurance* (Br. in Opp. 5) have attempted to bolster their state law argument by relying upon *Dahms v. General Elevator Co.*, 214 Cal. 733 (1932). In *Dahms*, the defendant had contracted with the plaintiff's employer to maintain and repair an elevator, which later fell and injured plaintiff. The FAA's inspections, which are designed to protect the public, are in no way comparable to inspections by a private company that contracts to guarantee the safety of a particular piece of equipment. "Our common law has always placed great emphasis on possible pecuniary benefit to the defendant as a criterion in determining whether or not he is under a duty of care." Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DePaul L. Rev. 30, 53 (1951). Nor can respondents argue that their relationship with the FAA as third and fourth party "beneficiaries" is at all comparable to the direct relationship between the plaintiff and the defendant in *Dahms*.

a certificate without examining all aspects of a design or modification that are submitted for approval.

**2. Respondents Did Not And Could Not Reasonably Rely on the FAA's Inspections and Certifications in these Cases**

To recover under the good samaritan doctrine, it is not sufficient to show that the good samaritan negligently performed a necessary service. The plaintiff must also prove that the effect of any negligent conduct was either to increase the risk of harm or to cause injury because of another person's justifiable reliance on the undertaking.<sup>82</sup> The first alternative is plainly inapplicable to this situation, because the government's issuance of a certificate cannot possibly increase the risk of harm created by the manufacturer's or operator's negligence. See, e.g., 82-1350 Pet. App. 14a; *Zabala Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir.), cert. denied, 435 U.S. 1006 (1978); *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 562 (8th Cir. 1979).

The court of appeals concluded, however, that liability was appropriate because "[t]he United States should expect that members of the public will rely on the proper performance by the F.A.A. of the duty to inspect and certify" (82-1349 Pet. App. 5a). We question whether this unsubstantiated assertion is accurate with respect to large segments of the American public. But the assertion is surely preposterous with respect to the passengers in *Mascher*, who were Brazilian residents flying from Rio de Janeiro to Paris in an airplane owned and operated by a Brazilian airline. Apparently, according to the court of appeals, the United States should expect that members of the Brazilian public (and, presumably, citizens of other

<sup>82</sup> A third ground for liability arises if the good samaritan undertakes to perform a duty owed by another to a third person. *Restatement (Second) of Torts* § 324A(b) (1965). That aspect of the doctrine does not apply to these cases, because the manufacturer or operator of an aircraft retains the primary duty under the statute to comply with minimum safety standards. The FAA's certification process in no way substitutes for that duty.

countries as well) are aware of and will rely on the FAA's certification procedures.

In any event, general reliance of the sort described by the court of appeals is not sufficient to impose liability on the government as a good samaritan. As the Eighth Circuit recognized in an analogous context, "reliance on the inspection in general is not sufficient \* \* \* to impose a duty of care \* \* \*. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.'" *Gelley v. Astra Pharmaceutical Products, Inc.*, *supra*, 610 F.2d at 561, quoting *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-807 (Minn. 1979).<sup>33</sup> Similarly, in *Zabala Clemente v. United States*, *supra*, 567 F.2d at 1148, the First Circuit held that the FAA's failure to comply with a local directive to warn passengers of "any safety problems" created no liability because passengers did not know about the specific duties the FAA imposed on its employees and thus could not have relied to their detriment on the FAA. See also *Sellfors v. United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), petition for cert. pending, No. 82-1178 (filed May 2, 1983); *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982); *Davis v. United States*, 536 F.2d 758 (8th Cir. 1976), *aff'g* 395 F.Supp. 793 (D. Neb. 1975); *Davis v. Liberty Mutual Insurance Co.*, 525 F.2d 1204, 1208 (5th Cir. 1976).

The court of appeals thus erred in holding that tort liability could be predicated on an alleged knowledge commonly held by passengers that the FAA inspects and certifies aircraft. Applying the proper standard of reliance, it is plain that the passengers in *United Scottish Insurance* could not have relied within the meaning of Section 324A; they were wholly unaware that the FAA issues

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<sup>33</sup> This more limited concept of reliance is fully consistent with our submission regarding the type of service that is required under the good samaritan doctrine. Specific reliance will generally follow when one person performs a direct service for another. But the FAA performed no service for any of the respondents.



supplemental type certificates, and, even if they had known, nothing in the record indicates that anyone decided to forego alternative protections because of the FAA's certification process. Even less of a claim can be made that the Brazilian passengers in *Mascher* relied on the CAA's issuance of a type certificate to Boeing in 1958, 15 years before they decided to board their flight to Paris.<sup>34</sup>

Respondents Dowdle and Varig Airlines claim that they knew that the FAA had issued a certificate of airworthiness and they relied upon that document in deciding to purchase their planes.<sup>35</sup> Aside from the obvious point that these claims sound precisely like claims of misrepresentation (see pages 46-50, *infra*), it is clear that respondents' reliance on the FAA was wholly unjustified. Given the nature of the FAA's certification program, it is unreasonable for anyone to rely upon the agency's law enforcement activities to *guarantee* an aircraft's safety. In finding reliance, the court of appeals in *United Scottish Insurance* emphasized that Congress "occup[ie]d the

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<sup>34</sup> Respondents in *Mascher* rely solely on an affidavit of the brother of one of the passengers (see Brief for Appellant in No. 81-5399, at 8-9) asserting that the deceased passenger had "complete faith" in American planes because they were subject to rigid government inspections. If such generalized expectations were sufficient, virtually everyone could be said to rely on the FAA's efforts to enforce compliance with safety regulations; under the court of appeals' theory, the United States would be liable whenever a plane manufactured in the United States crashed anywhere in the world due to a mechanical failure.

<sup>35</sup> Varig's actual reliance on the FAA's certification process is belied by the record. When Varig had the aircraft exported from the United States, it did not even request the issuance of a Class I Export Certificate of Airworthiness from the FAA (see page 7, *supra*). In the absence of such a certificate, the United States government makes no representation of regulatory compliance with respect to an exported aircraft. 14 C.F.R. 21.335(e). When the aircraft was sold to Varig in 1969, four years prior to the crash, it was removed from the United States Civil Aircraft Registry and from the regulatory authority of the FAA (J.A. 104). The aircraft, at that time, was placed on the Brazilian registry, and, accordingly, was within the Brazilian government's control. J.A. 106.

field of" commercial aviation safety in 1926 (82-1350 Pet. App. 4a). But Congress by this action merely assumed for the federal government regulatory responsibilities previously exercised by the states; it never intended to preempt the safety responsibilities of the airline industry. Congress instead directed the FAA to enforce the obligations of those who *do* have the duty to guarantee safety—aircraft operators and manufacturers. See *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982). Consistent with this direction, the agency has never undertaken to check—or held itself out as checking—every detail of every aircraft. See pages 7-9, *supra*; pages 43-46, *infra*. In all phases of the certification process, the agency relies on the industry, not vice versa; given the FAA's resources, it could not possibly investigate every potential safety defect.

Thus, it would be unreasonable for the purchaser of an airplane to rely upon the FAA's certification papers as a guarantee of safety or to forego other efforts to check the airworthiness of such a substantial investment. It is conceivable that no FAA employee ever inspected the aircraft in question, and even if there had been an FAA inspection,<sup>36</sup> more likely than not it would have been a mere spot check in the case of a reputable manufacturer or installer (*Handbook, supra*, at 39). Indeed, even after years of discovery in these cases there is nothing in the records indicating precisely what type of inspection of the airplanes was conducted or by whom. Under these circumstances, purchasers of aircraft must rely on the assurances of manufacturers and installers—here, Boeing and Aerodyne—rather than the FAA.

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<sup>36</sup> Obviously, if the inspection were conducted by a designated representative of the manufacturer, then the United States would not be liable since the FTCA is limited to claims of negligence by federal employees. See *United States v. Orleans*, 425 U.S. 807 (1976); *Garbarino v. United States*, 666 F.2d 1061, 1066 (6th Cir. 1981).

### 3. *The Relationship Between the FAA and Respondents is Too Remote to Create A Duty of Care*

The foregoing examination of the specific elements of the good samaritan doctrine reveals that the FAA's certification process is fundamentally different from the kinds of operational activities that the doctrine was designed to address. Accordingly, neither the good samaritan duty nor any other duty of care can be extended to the agency's action that would run to respondents.

The key to the existence of a duty "always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E.2d 896, 898 (1928) (Cardozo, J.). The FAA's certification process is designed to be an "instrument for good"; it does not create any new danger, and it does not engender any reliance beyond that created by the manufacturer's and operator's duty to build and maintain an aircraft that complies with minimum safety standards. Respondents argue, as did the plaintiffs in *H. R. Moch*, that by retaining the option to inspect for defects, the FAA "was brought into such a relation with everyone who might potentially" use the airplane "as to give to negligent performance . . . the quality of a tort." *Ibid.* Justice Cardozo's answer applies equally here: "The law does not spread its protection so far." *Ibid.*, quoting *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (Holmes, J.). Since respondents have failed to show that the United States would be liable as a private person under the good samaritan doctrine, recovery is barred under 28 U.S.C. 1346(b) and 2674.

## II. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT BARS LIABILITY BASED ON THE ALLEGED NEGLIGENCE OF THE FAA IN CARRYING OUT ITS REGULATORY DUTY OF ISSUING AIRWORTHINESS CERTIFICATES

### A. The Discretionary Function Exception Is Intended To Shield Regulatory Activities Such As Those Undertaken By the FAA From Private Tort Litigation

The Tort Claims Act precludes recovery for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). This provision, like the private person limitation in 28 U.S.C. 1346(b) and 2674, is intended to insulate the United States from "liability arising from acts of a governmental nature or function," where the agency's exercise of judgment should not be subject to judicial oversight. *Dalehite v. United States*, 346 U.S. 15, 28 (1953). The FAA regulatory decision-making challenged by respondents falls squarely within this exception.

As the Court noted in *Dalehite v. United States*, *supra*, 346 U.S. at 26, "[t]he meaning of the governmental regulatory function exception from suits . . . shows most clearly in the history of the Tort Claims Bill in the Seventy-seventh Congress." The FTCA was the product of more than two dozen different bills introduced since 1923. See *United States v. Spelar*, 338 U.S. 217, 219-220 (1949). Many of the earlier bills contained specific exceptions from liability that "were couched in terms of specific spheres of federal activity, such as postal service, the activities of the Securities and Exchange Commission, or the collection of taxes." *Dalehite v. United States*, *supra*, 346 U.S. at 26 (footnote omitted). See,

e.g., Section 303(7) of S. 2690, 76th Cong., 1st Sess. (1939) and Section 303(7) of H.R. 5299, 77th Cong., 1st Sess. (1941), exempting claims arising from enforcement activities of the Federal Trade Commission and the Securities and Exchange Commission. The 77th Congress removed the exemptions granted to specific agencies and expanded the exception to include all discretionary functions. Congress made the change with the declared intent to bar "claims against Federal agencies growing out of their regulatory activities." House Comm. on the Judiciary, 77th Cong., 2d Sess., *Federal Tort Claims Act, Memorandum, With Appendices, Explanatory of Comm. Print of H.R. 5373*, at 8 (Comm. Print 1942). The efforts of the FAA to detect violations of its minimum safety standards are as much a discretionary regulatory activity as attempts by the FTC or SEC to ferret out infractions of their statutes and rules.

The only decision of this Court expressly interpreting Section 2680(a) is *Dalehite v. United States*, *supra*. There the Court held that the discretionary function exception barred a series of suits against the United States resulting from the disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed according to the specifications and under the control of the United States. The Court concluded that the discretionary function exception prohibited claims based on (1) the cabinet-level decision to institute the fertilizer program; (2) the need for further experimentation with the fertilizer to determine the possibility of explosion; (3) the drafting of the basic plan of manufacture, including the decisions regarding the coating, bagging temperature and bagging materials, and (4) the failure to police properly the storage and loading of the fertilizer. 346 U.S. at 37-44. Although the Court found it "unnecessary to define, apart from this case, precisely where discretion ends," it nevertheless stated that the exception "includes more than the initiation of programs and activities." *Id.* at 35. Rather, "[w]here there is room for policy judgment and decision there is discretion. It nec-

essarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 36.

The court of appeals mistakenly ruled that the discretionary function exception does not apply to the FAA's certification activities because it concluded that, in light of the agency's detailed regulations, "no room for policy judgment or decision exists \* \* \*" (82-1350 Pet. App. 5a). In the court of appeals' view, "[a] proper inspection will discover facts. The facts will show either compliance or noncompliance" with the FAA's safety standards (82-1349 Pet. App. 7a). These assertions reflect an unduly narrow view of what constitutes a discretionary function and grossly oversimplify and mischaracterize the FAA's role both in enforcing minimum safety standards and in deciding whether to issue an airworthiness certificate to an applicant.<sup>37</sup>

The FAA's certification process has both an active and a passive quality. The agency does review certification applications and decides in the exercise of its best scientific and engineering judgment whether aspects of a proposed design satisfy the minimum safety standards and thus will be airworthy. The agency, however, also declines to review some details in every application because of resource limitations and other considerations. Even if it were possible in theory to check *every* facet of *every* aircraft before issuing the various certificates, the undertaking would require an enormous increase in agency personnel and a major restructuring of operating procedures. The court of appeals' syllogism of inspection leading to factual determinations leading to a virtually ministerial determination of compliance is therefore a distortion of the actual process. What the court's superficial analysis ignores is the significant amount of discretion that the agency necessarily exercises in making the

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<sup>37</sup> Indeed, the FAA's determination whether to issue a type certificate has been characterized as a "regulatory adjudication." See Harrison and Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 35 (1978).

public interest determination of whether to issue a requested certificate. Section 2680(a) was intended to shield that discretion from judicial second-guessing in the form of tort litigation.

**B. The FAA's Certification Process Is Permeated with Discretionary Conduct of the Sort Typically Protected By Section 2680(a)**

**1. *The Decision To Approve An Aircraft's Design Requires Scientific and Engineering Judgment***

The FAA's determination that a particular aircraft design or modification satisfies its regulatory standards is closely analogous to agency action that the lower courts have held to be barred from suit under the FTCA. In *First National Bank in Albuquerque v. United States*, 552 F.2d 370 (10th Cir.), cert. denied, 434 U.S. 835 (1977), for example, the court of appeals held that claims based on alleged negligence by Department of Agriculture employees in approving, under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. (& Supp. V) 135 *et seq.*, the labeling of grain treated with a poisonous substance was barred by the discretionary function exception because the government had to make a scientific assessment of what the public safety requires in evaluating the adequacy of the labeling. See also *Gelley v. Astra Pharmaceutical Products, Inc.*, *supra*, (discretionary function exception bars a claim based on the Food and Drug Administration's scientific determination to allow a drug to remain in interstate commerce in misbranded or adulterated condition).

Similarly, the judgments involved in these cases cannot be characterized as the ministerial application of a clear standard to a particular fact situation. FAA employees must make difficult scientific and engineering judgments in deciding whether to approve a particular design or change in a design.<sup>36</sup> The determination in *United Scot-*

<sup>36</sup> The development and promulgation of the FAA's airworthiness standards is a function that involves technical judgment and policy considerations at the highest levels of the FAA. To a layperson, the airworthiness standards may appear to be very detailed and



*tish Insurance* whether a gasoline line in a heater has "excessive vibration" on the one hand (14 C.F.R. 23.993 (a)) or sufficient flexibility to withstand stress on the other requires a difficult, and essentially subjective, engineering assessment. By the same token, the determination in *Varig Airlines* and *Mascher* whether waste receptacles adequately provide for "containing possible fires" (see note 16, *supra*) calls for an inherently subjective and predictive judgment.<sup>39</sup>

**2. The FAA Has Discretion To Approve Aircraft  
As Airworthy Without Checking Every Detail to  
Assure Compliance With Minimum Standards**

Even if the court of appeals were correct in concluding that the FAA's decision to approve a particular design that it has inspected is not discretionary, its analysis fails to take account of the agency's discretion to issue a certificate without verifying that there has been compliance with every minimum safety standard. The court of appeals inferred from the detail of the FAA's safety standards that the agency had fully exercised its administrative discretion in favor of exhaustive inspections designed to guarantee the airworthiness of an approved aircraft. But the purpose of the detailed standards is to guide *manufacturers* in designing and building minimally safe aircraft; the standards do not lessen the

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explicit. To the designer, engineer, flight test pilot or inspector, however, the standards are relatively general and require considerable discretion in their application. See note 39, *infra*. Indeed, in order not to inhibit new design concepts or techniques, and to permit flexibility and new technologies, the airworthiness standards are intentionally worded to achieve a safety objective without establishing fixed design specifications. See *NAS Report, supra*, at 25, 33.

<sup>39</sup> The examples in the text are not atypical. For example, the flight requirements for aircraft "must show suitable stability and control 'feel' \* \* \* in any condition normally encountered in service \* \* \*," 14 C.F.R. 23.171. Similarly, the standard for an aircraft's electrical system is generally that it "must be adequate for its intended use." 14 C.F.R. 23.1351(a). The application of these standards is obviously not a ministerial chore.

FAA's inherent discretion to decide how to allocate its resources in attempting to administer its statute. Indeed, if anything, the very quantity and detail of the regulations emphasize that the FAA must retain flexibility to rely upon private industry to protect aircraft safety.

Within the regulatory concept of the certification process there may be endless opportunity for the discovery of error. Yet inherent in the FAA's regulatory auditing process, which contemplates a review of tests reasonably necessary to demonstrate compliance with minimum standards, lies the reality that not all errors and defects can be discovered.

Harrison and Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 43 (1978). The FAA, with a few hundred inspectors, simply cannot ensure that each of its regulations has been satisfied before issuing a type certificate, supplemental type certificate, or airworthiness certificate—any more, for example, than a municipal inspection station can ensure that every automobile is safe before issuing a yearly registration sticker. Some judgment must be made concerning how best to use the finite resources available to maximize compliance with the statute; this judgment involves a determination of both whether any inspection is necessary, and, if so, how extensive that inspection should be.<sup>40</sup>

The court of appeals appeared to assume that the FAA purports to check compliance with every safety standard for every certified aircraft. But the *FAA Handbook* clearly indicates that inspectors are free to decide whether and how thoroughly to review the manufac-

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<sup>40</sup> See, e.g., Parrish, *Outfitting in 1983: A Buyer's Market*, 52 Bus. & Com. Aviation 76, 82 (1983):

When a newly outfitted or refurbished aircraft is inspected by the FAA for compliance with regulations, there is no way for agency inspectors to confirm that all the interior materials and installations procedures—particularly regarding the use of new-technology materials—meet the applicable standards. Inspectors and operators must rely on the integrity of the outfitting center and its suppliers to use the appropriate materials.

turers' efforts in any given situation (*Handbook, supra*, at 39; pages 7-9, *supra*). The provision describing inspections for supplemental type certifications, for example, authorizes the inspector to rely upon spot checks of manufacturers who have proven reliability (see pages 7-8, *supra*). Even more discretion to defer to the manufacturer's engineers is granted in the design review process leading to type certification. See *NAS Report, supra*, at 29; see note 9, *supra*.

This discretion is critical to the FAA's effort to impose its standards on an entire industry. Like many federal agencies, the FAA polices the industry it regulates. The FAA possesses authority to seek civil penalties for violations of the certification requirements, 49 U.S.C. (& Supp. V) 1471, and may even pursue criminal penalties if the violation is knowing and willful. 49 U.S.C. (& Supp. V) 1472. The more common sanction is to strip the manufacturer or operator of its certification, thereby effectively grounding the aircraft. 49 U.S.C. 1425. The inspection process is the central means by which the FAA discovers violations and thereby enforces its laws, and it is thus crucial that the FAA be permitted to decide for itself which aircraft to inspect and how extensive that inspection should be.<sup>41</sup> Courts have no competence to oversee these law enforcement determinations.

In some instances, the FAA may determine that a complete examination is in order; in other cases, it may decide that only a spot check is warranted; on yet other occasions, the agency may conclude that (given the manufacturer or installer's track record and representations) no further inspection need be made. Whichever choice is made, a certificate eventually will issue, although it is generally impossible long after the fact to reconstruct the

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<sup>41</sup> Lower courts have uniformly held that discretionary decisions implementing analogous types of law enforcement activities are immunized by the discretionary function exception. See, e.g., *Hoffman v. United States*, 600 F.2d 590 (6th Cir. 1979), cert. denied, 444 U.S. 1073 (1980); *Lawrence v. United States*, 381 F.2d 989, 990-991 (9th Cir. 1967); *Smith v. United States*, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967).

type of inspection performed. In essence, respondents claim that the FAA should have undertaken a more painstaking inspection prior to issuing airworthiness certificates to the specific aircraft involved here. But the decision whether to do so, or instead to choose one of the other reasonable regulatory alternatives, is protected by the discretionary function exception. See *Garbarino v. United States*, *supra*, 666 F.2d at 1065-1066.

In sum, the court below utterly disregarded the FAA's regulatory role and adopted a rule that would require the FAA to change dramatically its regulatory function from that of a policeman to that of a mechanic or repairman (see note 22, *supra*), with a corresponding need to reallocate its resources. Congress adopted the discretionary function exception precisely to prohibit such judicial restructuring of an agency's assigned responsibilities.

### **III. THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT BARS RESPONDENTS' CLAIMS BASED SOLELY ON THEIR RELIANCE ON THE FAA'S INSPECTION AND CERTIFICATION ACTIVITIES**

When Congress in 1946 waived the sovereign immunity of the United States for many common law torts, it recognized that there were "a series of torts as to which, for the time being at least, it may be dangerous for the government to subject itself to suit \* \* \*." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940). See also *id.* at 22; S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Accordingly, Congress expressly exempted from the Tort Claims Act "[a]ny claim arising out of," *inter alia*, "misrepresentation." 28 U.S.C. 2680(h). If, contrary to our submissions in parts I and II, respondents have stated a claim that satisfies the "private person" requirement in Sections 1346(b) and 2674 and is not barred by the discretionary function exception in Section 2680(a), respondents' claims arise out of the tort of misrepresentation, and thus recovery against the United States is precluded.

All of respondents' claims ultimately derive from an alleged reliance by respondents Dowdle and Varig, in purchasing the airplanes that crashed, upon the FAA's issuance of a certificate which represented that the airplanes were airworthy when in fact they may not have been. Such claims constitute what is commonly understood as the tort of misrepresentation.

Section 311 of the *Restatement (Second) of Torts* (1965) defines the tort of negligent misrepresentation involving risk of physical harm as follows:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other; or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

Illustration 8 of Section 311 is directly analogous to the facts of this case. That illustration states:

The A Boiler Insurance Company undertakes as a part of its services to inspect the boiler of B. It issues a certificate that the boiler is in good condition for use. In reliance upon this certificate, B uses the boiler. The boiler bursts, owing to a defect which a reasonably careful inspection would have disclosed. Explosion of the boiler wrecks the adjacent building of C and causes bodily harm to him. The A company is subject to liability to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.<sup>42</sup>

<sup>42</sup> This illustration also was used in the *Restatement of Torts* § 311 (1934). In enacting Section 2680(h), Congress intended to adopt the commonly understood definition of "misrepresentation," *United States v. Neustadt*, 366 U.S. 696, 707 (1961), which is best ascertained from the *Restatement of Torts* in existence at the time.

See *Reynolds v. United States*, 643 F.2d 707 (10th Cir.), cert. denied, 454 U.S. 817 (1981); *Anglo-American & Overseas Corp. v. United States*, 144 F.Supp. 635, 636 (S.D.N.Y. 1956), aff'd, 242 F.2d 236 (2d Cir. 1957).<sup>43</sup>

Just as in the boiler illustration, respondents allegedly relied here on the certificate issued by an inspector. In *United Scottish Insurance*, respondents' evidence was that they relied on the communication in the FAA's certificates regarding the heater's installation and the plane's airworthiness. The mechanic sent by respondent Dowdle, the purchaser of the plane, to inspect the Dehavilland Dove prior to the sale testified that he relied on the FAA's airworthiness certificate as establishing that the heater had been properly installed (J.A. 229) and that he usually did not go behind this "paperwork" to check an airplane himself (*ibid.*). In other words, respondents relied on the allegedly incorrect communication from the FAA, which is the essence of the tort of misrepresentation. Similarly, the claims in the *Varig Airlines* and *Mascher* cases—that the Brazilian airline relied to its detriment on the allegedly false statement in the FAA certificate issued to Boeing that the plane was airworthy—plainly arise out of misrepresentation.

The court of appeals ruled, however, that respondents' claims were based on the "negligent inspection" and, hence, were not precluded by Section 2680(h). The rea-

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<sup>43</sup> Prior to the enactment of the Tort Claims Act, it was common for inspectors to be sued under a theory of negligent misrepresentation for the "careless performance of a service" leading to "careless words" certifying the existence of a particular set of facts. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). See also *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *National Iron & Steel Co. v. Hunt*, 312 Ill. 245, 143 N.E. 833 (1924); *Gordon v. Livingston*, 12 Mo. App. 267 (1882); *Tardos v. Bozant*, 1 La. Ann. 199 (1846); Annot., 68 A.L.R. 375 (1930); Annot., 34 A.L.R. 67 (1925); F. Harper, *A Treatise on the Law of Torts* § 76 (1933). In some cases, however, recovery was denied because the particular jurisdiction did not recognize the tort of negligent misrepresentation.

soning of the court of appeals is flatly inconsistent with this Court's decision in *United States v. Neustadt*, 366 U.S. 696 (1961). In *Neustadt*, the Court held that a claim that the Federal Housing Administration had negligently inspected a house and had misled plaintiffs into purchasing the house because of a false "Statement of FHA Appraisal" was merely "to state the traditional and commonly understood legal definition of the tort of 'negligent misrepresentation'" for which recovery against the United States was barred. 366 U.S. at 706.

As in *Neustadt*, the instant cases involve a situation in which a government employee allegedly was negligent in inspecting and certifying in a written report that the object inspected was in good condition. Here again, as in *Neustadt*, respondents claimed that they were injured as a result of their reliance on the false information conveyed to them by the report issued by the government. There is simply no way to avoid characterizing respondents' claims as ones of negligent misrepresentation.

This Court's decision in *Block v. Neal*, No. 81-1494 (Mar. 7, 1983), is not to the contrary. In *Neal*, the Court held that Section 2680(h) did not require dismissal of a complaint alleging that the Farmers Home Administration had breached a duty to inspect and *supervise the construction of* plaintiff's home. The Court described the gist of the plaintiff's claim as follows: "FmHA officials voluntarily undertook to *supervise construction of* her house, [and] \* \* \* the officials failed to use due care in carrying out their *supervisory activity* \* \* \*." Slip op. 8 (emphasis added). The Court reasoned that since the plaintiff had alleged that the inspection in *Neal* gave rise to a duty on the FmHA inspector to do more than simply communicate the results of the inspection, plaintiff's claims based on the duty to *supervise* were not barred by the misrepresentation exception. The Court did not, however, cast any doubt on the holding in *Neustadt* that Section 2680(h) precludes a claim that a plaintiff relied on a communication that was the product of an allegedly negligent governmental inspection. See slip op. 7-8.



Respondents' claims cannot be construed as involving anything more than reliance on the incorrect communication of information through the issuance of certificates. Respondents were not involved in the FAA's inspection and certification process; thus, even if some other duty could be derived from the inspection process, it would extend only to the persons in the position comparable to the plaintiff in *Neal*—Aerodyne in *United Scottish Insurance* and Boeing in *Varig Airlines* and *Mascher*. No duty other than the issuance on an accurate certificate based on the inspection could possibly extend to third or fourth parties such as respondents.<sup>44</sup> See, e.g., *Baroni v. United States*, 662 F.2d 297 (5th Cir. 1981), cert. denied, No. 81-1326 (Mar. 21, 1983); *Reynolds v. United States*, *supra*.

In the present cases, there is no activity on the part of the government analogous to the supervision of the construction of the plaintiff's home in *Neal*. Here, respondents incurred injury because they allegedly relied, directly or indirectly, on the government's misrepresentation, which was communicated through a certification document. Accordingly, respondents' claims are barred by the misrepresentation exception to the Tort Claims Act.

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<sup>44</sup> Indeed, it was remote claims by individuals in the position of respondents that in all likelihood prompted Congress to include the misrepresentation exception in the Tort Claims Act. England denied recovery for all negligent misrepresentations until 1963. Compare *Derry v. Peek*, 14 App. Cas. 337 (1889), with *Hedley Byrne & Co. v. Heller & Partners*, 1964 App. Cas. 465. According to Dean Prosser, a majority of courts in this country follow *Derry v. Peek*, and deny recovery for innocent or negligent misrepresentations generally, out of fear that the scope of liability would be difficult to limit once recovery is recognized. See W. Prosser, *Handbook of the Law of Torts* 706-707 (4th ed. 1971); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1983

## APPENDIX

28 U.S.C. 1346 (b) provides, in pertinent part:

[T]he district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, \* \* \* for injury \* \* \* or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides, in pertinent part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances \* \* \*.

28 U.S.C. 2680 provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim \* \* \* based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

\* \* \* \* \*

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights \* \* \*.

Office - Supreme Court, U.S.  
FILED  
OCT 28 1983  
ALEXANDER L. STEVENS  
CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA,  
*Petitioner,*  
v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES),  
*Respondent.*

---

UNITED STATES OF AMERICA,  
*Petitioner,*  
v.

EMMA ROSA MASCHER, *et al.*,  
*Respondents.*

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UNITED STATES OF AMERICA,  
*Petitioner,*  
v.

UNITED SCOTTISH INSURANCE CO., *et al.*,  
*Respondents.*

---

On Writs of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR RESPONDENT VARIG AIRLINES**

---

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## QUESTIONS PRESENTED

1. Whether the United States can be held liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, for the negligence of Federal Aviation Administration ("FAA") employees in reviewing and inspecting, for type certification purposes, the design of a commercial transport category aircraft which did not comply with mandatory FAA fire protection safety regulations, where a private person in similar circumstances would be held liable under the "Good Samaritan" doctrine of the applicable state law.

2. Whether the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars claims based on the FAA's negligent review and inspection, for type certification purposes, of commercial transport category aircraft, where the FAA engineers and inspectors approved an aircraft design that did not comply with detailed, mandatory FAA fire protection safety regulations, and the noncompliance was both obvious and substantial.

3. Whether the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars claims based on the FAA's negligent review and inspection, for type certification purposes, of the design of commercial transport category aircraft.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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No. 82-1349

UNITED STATES OF AMERICA,  
v. *Petitioner,*  
S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES),  
*Respondent.*

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UNITED STATES OF AMERICA,  
v. *Petitioner,*  
EMMA ROSA MASCHER, *et al.,*  
*Respondents.*

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No. 82-1350

UNITED STATES OF AMERICA,  
v. *Petitioner,*  
UNITED SCOTTISH INSURANCE CO., *et al.,*  
*Respondents.*

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On Writs of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF FOR RESPONDENT VARIG AIRLINES**

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Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in opposition to the brief on the merits filed by the United States of America.<sup>1</sup>

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<sup>1</sup> VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

## STATEMENT OF THE CASE

The government's brief conspicuously avoids any real discussion of the actual facts in the record of the *Varig* case. Since the issues presented depend heavily on the facts, VARIG believes that a fuller discussion of the considerable evidence in the record below is essential to a proper disposition of the case.

### A. Facts of the VARIG Crash

On July 11, 1973, VARIG's Flight 820 took off from Rio de Janeiro for a scheduled eleven-hour nonstop flight to Paris.<sup>2</sup> The aircraft was one of VARIG's 707 jet aircraft manufactured by Boeing, bearing Registration No. PP-VJZ. The flight progressed without incident until a few minutes before landing at Orly Airport, when a passenger exited from an aft lavatory of the aircraft and reported smoke to the flight attendants. Within the scope of four to six minutes, an in-flight fire on board the aircraft in one of the aft lavatories reached such intensity that it caused thick, black smoke to roll forward from the extreme aft section of the aircraft through both passenger cabins into the cockpit. Within moments, the smoke was so dense that cabin crew members could not see the exit windows, or the passengers; and the pilots could see neither each other nor any of their flight instruments. As a result, the pilots opened the sliding windows in the cockpit and stuck their heads out into the windstream in order to make a crash landing into a field just a few miles from Orly Airport.

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<sup>2</sup> Because the aircraft crashed in France, the official accident investigation came under the jurisdiction of a French Commission of Inquiry. Rudolf Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board, was assigned to the French Commission as the Accredited Representative of the United States. Mr. Kapustin's deposition testimony and the exhibits introduced during his deposition, including the Final Report of the French Commission, establish the facts set forth in the text concerning the crash. The Final Report is included in the Joint Appendix ("J.A.") at 49-98.

When the plane came to a stop in the field only six minutes after the smoke was first discovered, most of the people in the plane were unconscious or dead from asphyxiation or toxic gases. Seven crew members and one hundred seventeen passengers—a total of 124 persons—died in the crash. The aircraft—valued at six million dollars—was totally destroyed.

#### **B. Accident Investigation and Probable Cause of the VARIG Crash**

The official accident investigation was conducted by the French Commission of Inquiry with the assistance of Mr. Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board ("NTSB"), who took part in preparing the Commission's official Final "Probable Cause" Report, which was issued on April 6, 1976. (Kapustin deposition, Exhibits 30, 31, J.A. 49-98). This Final Report concludes that "[t]he probable cause of the accident is a fire which appears to have broken out in the sink unit of the rear starboard lavatory . . . . The fire could have been caused by either an electrical incident or by passenger carelessness." (J.A. 98). Mr. Kapustin testified that he agreed with this "probable cause" conclusion, and with the view that the fire probably started in the towel disposal area located in the sink unit of the aft lavatory. (Kapustin deposition at 1204-06, J.A. 127-28). In the district court the government admitted for purposes of its summary judgment motion that "the fire did originate in the lavatory waste container."<sup>3</sup>

As part of the accident investigation, Mr. Kapustin observed VARIG's voluntary teardown of the aft lavatories of an identical "sister ship" to PP-VJZ (Kapustin deposition at 698-875). The teardown was documented by a series of photographs, which Mr. Kapustin identified at his deposition. (Exhibits 25.1-25.56). Six of the exhibits

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<sup>3</sup> United States' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, at 6.



(Nos. 25.6, 25.10, 25.11, 25.28, 25.44 and 25.45) are included in the Appendix of Photographic Exhibits ("Photo App.") filed with this Court. Exhibit 25.6 shows the interior of the starboard aft lavatory before the tear-down began. (Kapustin deposition at 740-41, J.A. 119). The item circled on the photograph and marked as RK 56 was identified by Mr. Kapustin as the spring-loaded waste towel disposal door. According to Mr. Kapustin's testimony, waste towels and other papers are deposited through this spring-loaded door by passengers using the aircraft's lavatory. These waste towels do not fall into an enclosed metal container under the sink. Instead, they fall into an open area located under the sink and behind a service door (RK 63, Exhibit 25.6). At the bottom of this open area is a removable box with no top or cover (RK 71, Exhibit 25.10) into which the waste towels are supposed to drop. This open area under the sink also contains the hot water heater (RK 72, Exhibit 25.11), the electrical connections leading to it (RK 75), a box containing electrical connections (RK 78), a wire bundle (RK 79), and the plumbing to the sink. Mr. Kapustin and the other accident investigators determined that during crowded flights this entire open area beneath the sink could be filled with used, dried-out paper towels that would be in direct contact with the water heater and the other electrical wires and components in that area. (Kapustin deposition at 792-93, J.A. 119-20).

According to the Final Report of the French Commission, in "this particular accident, involving a long flight (11 hours) with almost total occupancy of the tourist class section (97 passengers out of 109 available seats), it can rightly be supposed that the space used to dispose of papers [i.e., the open area under the sink] was full." (J.A. 91). In addition, the accident investigators learned that cigarette butts are frequently found in the towel disposal area during cleaning operations at the end of a flight. (Kapustin deposition at 1041, J.A. 126).

As the teardown of the sister ship's lavatory progressed, the investigators could see that the sink and

cabinet module is installed into the aircraft as a single unit (RK 99, Exhibit 25.28). Behind the sink and cabinet module an airspace exists between the aircraft bulkhead and the lavatory unit (RK 104, Exhibit 25.28), which Mr. Kapustin and the other accident investigators concluded could produce a chimney effect in the event of a lavatory fire. (Kapustin deposition at 844, J.A. 120). The investigators also noted that flexible rubber tubing running through the module supplies air to the lavatory air vent. (RK 60, Exhibit 25.6). Mr. Kapustin testified that if this tube burned through it would "open an air supply to the back of the compartment," and would "add oxygen and would aggravate a fire." (Kapustin deposition at 853, 856, J.A. 120).

When the investigators removed the sink and cabinet module from the aircraft bulkhead and observed the back of the unit, they saw a number of holes in it. (RK 123-25, Exhibit 25.44; RK 126, Exhibit 25.45) (Kapustin deposition at 904-16, J.A. 121-25). As part of his investigation, Mr. Kapustin attempted to ascertain the purpose of these holes and to determine whether the holes made the towel disposal area of the sink and cabinet something less than air-tight. He testified that the towel disposal area of the sink and cabinet unit could not contain a trash fire and that fire or smoke probably would come out of the holes in the back of the unit if a fire started in the towel disposal area. (Kapustin deposition at 915-17, J.A. 125). Mr. Kapustin went to Mr. Hall, a Boeing representative, in an attempt to ascertain the purpose of these holes, but no one at Boeing was "quite certain what the purpose of the holes—what they were there for." (Kapustin deposition at 936-37, J.A. 125; *see also* Nelson deposition at 121-23, J.A. 128-29).

Mr. Kapustin also attempted to determine whether the design of the lavatory sink unit complied with the FAA's Federal Aviation Regulations ("FARs") and their predecessors, the Civil Air Regulations ("CARs"). For present purposes, the most critical regulation is CAR

4b.381 (d), which was identified by Mr. Kapustin as being in effect at the time the Boeing 707 was issued a Type Certificate by the FAA. (Kapustin deposition at 715-18, J.A. 118-19). CAR 4b.381 (d) provides in pertinent part as follows:

### FIRE PROTECTION

§ 4b.381 *Cabin Interiors*. All compartments occupied or used by the crew or passengers shall comply with the following provisions.

....

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

Mr. Kapustin testified in unequivocal terms that the towel disposal area in the 707 lavatory sink unit did not comply with CAR 4b.381 (d):

Q. [By counsel for VARIG] Directing your attention to Exhibit 22.8, which is the section 4b.381 (d). . . . I would like to ask you in what regard did the aft lavatory trash container area of the 707's, such as operated by VARIG, fail to comply with that section, in your opinion?

....

A. [By Mr. Kapustin] Well, sir, the compartment, as such, did not, first of all, contain any—it was not a container. It was strictly a compartment into which the wastepaper material was allowed to fall when it was introduced by the flapper door that's up on top of the module.

Number 2, the area, in itself, if this were to be a container, contained flammable material, such as the plastic tubing for the water drains, the door, the large door, was of a wood composition material, which although it could have been fire-resistant to a degree, contained fabric, trim, which was not.

The entire compartment had large holes in it. These holes, even though they wore a cover which was airtight, would have made the entire compartment non

*air-tight and completely incapable of containing any fire or smoke.*

....

Q. Mr. Kapustin, in connection with the words in that regulation that refer to receptacles, "and shall incorporate covers or other provisions for containing possible fires," did you reach a conclusion as to whether or not this trash container area incorporated such a cover, or other provisions, that's referred to in that regulation.

....

A. Yes, sir.

Q. What was your conclusion in that regard?

A. *That there is no cover.* There's a flapper door, that was opened to put the wastepaper into the container, *but there was no cover, as such.*

(Kapustin deposition at 1065, 1069-72, J.A. 126-27, emphasis added).

Later in his deposition, Mr. Kapustin reiterated his view that the lavatory sink unit "was not capable of containing fire or smoke;" that no "expert evaluation" was needed because "[i]t was a simple open and shut situation, that the compartment did not meet the requirements;" and that "the compartment was full of holes and air spaces, and simply could not, *by any stretch of the imagination*, be considered capable of containing a fire if a fire were to occur in that compartment." (Kapustin deposition at 1597, 1625, J.A. 128, emphasis added).

As a result of Mr. Kapustin's investigation, the NTSB issued certain "Safety Recommendations"<sup>4</sup> which included a recommendation to the FAA that it "reevaluate certification compliance with section 4b.381(d) of the Civil Air Regulations on Boeing 707 series aircraft."

<sup>4</sup> NTSB Safety Recommendations A-73-67 through A-73-70, dated September 5, 1973. (J.A. 108-09).

The FAA, which is required by statute<sup>5</sup> to respond to the NTSB's Safety Recommendations, conducted an investigation into the compliance, for type certification purposes, of the Boeing 707 with applicable federal regulations, including CAR 4b.381(d). This investigation was conducted by Richard Nelson, an FAA airworthiness engineer, who went to Brazil to participate in the teardown of PP-VJZ's sister ship and to Seattle, Washington, to review the type certification file on the Boeing 707. In general, Mr. Nelson agreed with Mr. Kapustin's findings. Specifically, Mr. Nelson concluded that with respect to CAR 4b.381(d), the towel disposal area "appeared unsatisfactory from the fire containment standpoint," and that "it was not clear how the waste containers could possibly contain fire, as required by CAR 4b.381(d) . . . ." (Nelson deposition at 351-54 and Exhibit 26, J.A. 131-32, 146). Mr. Nelson was unable to locate any documentation or any evidence indicating that the 707 lavatory waste receptacles had been reviewed or inspected by the FAA and found to be in compliance with CAR 4b.381(d) prior to the issuance of the Type Certificate for the Boeing 707. (Nelson deposition at 140). Following Mr. Nelson's investigation the FAA responded to the NTSB's Safety Recommendations, reporting that, with regard to the 707 waste paper containers, it had discovered "some deficiencies associated with the [fire] containment provisions" of CAR 4b.381(d). (J.A. 111).<sup>6</sup>

---

<sup>5</sup> 49 U.S.C. §§ 1903, 1906.

<sup>6</sup> As a result of its investigation, the FAA issued two mandatory Airworthiness Directives ("ADs") requiring installation of ash trays and "No Smoking" signs in 707 lavatories and requiring compliance with Boeing Service Bulletins providing for sealing or covering the gaps and holes in the sink unit. The rationale for the ADs was that the sink unit was incapable of containing fire and that it was possible for fires originating there to "develop into uncontrollable cabin fires leading to aircraft destruction and loss of life." (Kapustin deposition, Exhibits 21.1, 21.3, J.A. 113-17).

### C. Type Certification of the Boeing 707

The government's description of the FAA's type certification process raises a new argument—*never made below*—that the FAA's resources are so limited that it cannot review and inspect every component in an aircraft type design for compliance with the FARs. Brief for the United States (hereinafter "Gov't Brief"), at 7-9. Rather, says the government, the FAA must necessarily pick and choose among the component designs in deciding which to review and inspect; and it is forced to perform no more than a "spot check" for compliance with the governing regulations. The government's vision of the type certification process is based upon two FAA handbooks and on the report of a study by the National Academy of Sciences,<sup>7</sup> none of which was ever cited or relied upon in the courts below in support of the government's summary judgment motion, none of which is part of the record in the *Varig* case, and none of which was in existence at the time the FAA employees negligently reviewed and inspected the Boeing 707 for type certification purposes.<sup>8</sup> In addition to the procedural defects in the government's presentation, it is directly inconsistent with the FAA's Manual of Procedure for type certification<sup>9</sup> in existence at the time the Boeing 707 was issued

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<sup>7</sup> These documents are entitled National Academy of Sciences, *Improving Aircraft Safety* (1980) (hereinafter "NAS Report"); FAA, *Order 8130.2B, Airworthiness Certification of Aircraft and Related Approvals* (1982) (hereinafter "Handbook 8130.2B"); and FAA, *Order 8110.4, Type Certification* (1967) (hereinafter "Handbook 8110.4"). Handbooks 8130.2B and 8110.4 were recently lodged with the Clerk of this Court.

<sup>8</sup> An earlier version of Handbook 8110.4 than the one lodged with the Court by the government was marked as Exhibit 35 in the Nelson deposition. It too post-dates the type certification of the Boeing 707.

<sup>9</sup> See Civil Aeronautics Administration ("CAA"), *Manual of Procedure, Flight Operations and Airworthiness, Type Certification* (1957), produced by the government in response to VARIG's Re-

[Footnote continued on page 10]



a Type Certificate,<sup>10</sup> and the actual deposition testimony given by FAA witnesses in the *Varig* case.

Furthermore, the government's brief does not always discriminate carefully between Type Certificates, Airworthiness Certificates and Supplemental Type Certificates. See Gov't Brief at 7-9. The Type Certificate involves a complete design review of a proposed new aircraft type never before manufactured. The Airworthiness Certificate involves primarily a physical inspection of a completed production aircraft to ensure that it conforms to the type certificated design; it does not involve a design review as such. A Supplemental Type Certificate involves approval of what may be a relatively minor modification to an approved type design. The *Varig* case involves negligence of the FAA in the review and inspection of the type design of the Boeing 707 for purposes of the initial type certification of that aircraft. The importance of the type certification procedure is obvious since, if the FAA negligently issues a Type Certificate for a defective design, this will guarantee that *all* subsequent aircraft of that type which are produced will conform to the same defective design. Because of the importance of these matters to a proper disposition of the *Varig* case, we will outline in some detail the evidence presented below on the type certification process.

The Boeing 707 type aircraft was type certificated under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, which requires the FAA "to promote safety of flight

\* [Continued]

quest for Documents (3d Set) No. 62 (hereinafter "Manual of Procedure"). A copy of this Manual has been lodged with the Clerk of this Court. The CAA's regulatory authority was transferred to the FAA in 1958.

<sup>10</sup> The Type Certificate for the Boeing 707-100 series was first issued in 1958 (Lippis deposition at 29). VARIG's aircraft PP-VJZ was a "higher performance, long-range 300C model Boeing 707." (Ritter Affidavit ¶ 6, J.A. 153). A Type Certificate for the Model 707-300 series was issued on July 15, 1959, and for the Model 707-300C series on April 30, 1963. (J.A. 156).



of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . . ." 49 U.S.C. § 1421.<sup>11</sup> In order to achieve these safety goals, the Act establishes a mandatory type certification procedure. Manufacturers who wish to produce a new type of commercial aircraft must obtain from the FAA a Type Certificate for that type aircraft. 49 U.S.C. § 1423(a)(2). A Type Certificate is issued if the aircraft meets the minimum design criteria specified in the detailed safety regulations promulgated by the FAA. See 14 C.F.R. Parts 21 & 25.<sup>12</sup> The FAA's Manual of Procedure applicable to this case states: "After . . . the CAA has verified that *all* applicable airworthiness requirements are met and a statement of compliance and other information required . . . are submitted, the type certificate will be issued." Manual of Procedure at 2 (emphasis added). Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, at the time the Boeing 707 design was reviewed, testified at his deposition that the principal purpose of the entire aircraft certification process is to promote aviation safety and that "the principal beneficiaries of the certification process were the passengers and the operators of the airplanes that" the FAA certificated. (Lippis deposition at 181-82). The FAA's Director of

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<sup>11</sup> Although PP-VJZ was one of the Model 707-300C series of aircraft, for which the Type Certificate was issued in 1963, some of the review work upon which the Type Certificate is based was performed before 1958 pursuant to the predecessor of the 1958 Federal Aviation Act, the Civil Aeronautics Act of 1938, 52 Stat. 973. For purposes of this case there is no significant difference between the policies and procedures of the 1938 Act and the 1958 Act.

<sup>12</sup> An Airworthiness Certificate must also be obtained for each aircraft manufactured pursuant to a Type Certificate. The Airworthiness Certificate is issued if the particular aircraft conforms to the design specified in the Type Certificate and is otherwise in condition for safe operation. 49 U.S.C. § 1423(c); 14 C.F.R. §§ 21.171-21.199.

Airworthiness, Melvin C. Beard, agreed with Mr. Lippis. (Beard deposition at 114-15).

The type certification process begins when the manufacturer submits an application for a Type Certificate. The applicant provides FAA engineers with detailed plans, data and documentation showing what it proposes to build and how it intends to demonstrate compliance with FAA regulations. (Lippis deposition at 30-31, J.A. 135). The FAA engineers then "sift through" the documentation to verify that there has been compliance with *each* applicable regulation. (Nelson deposition at 410-11, 413, J.A. 132; Lippis deposition at 39, 46, 55-56, 65, 135, J.A. 136-37, 140). While the Manual of Procedure permits the FAA engineers to check less than *all* of the data submitted by the applicant, it requires them to examine sufficient data "to ascertain that the design complies with the minimum airworthiness requirements." Manual of Procedure at 12.

After the applicant's data has been reviewed and the aircraft constructed, an FAA employee, called a "manufacturing inspector," must also inspect the aircraft in a "conformity inspection" to determine if detail design features, such as lavatory trash containers, comply with the approved design and with the applicable regulations. (Nelson deposition at 449-51, J.A. 132-34). The Manual of Procedure indicates that the manufacturing inspector's primary responsibility is to determine that the prototype aircraft conforms with drawings and specifications, and that his secondary responsibility is to cooperate with the FAA engineers "in the approval of certain design aspects which can best be evaluated by physical examination." *Id.* at 11-1. With regard to determining conformity, the Manual of Procedure states that "[r]egardless of the manufacturer's experience, it is the FAA inspector's responsibility to assure that a complete conformity inspection has been performed by the manufacturer and that the results of this inspection are properly recorded and reported." *Id.* at 11-2.

Contrary to the government's assertion, the FAA engineers and inspectors performing the type certification design reviews and inspections may not disregard *any* regulations, nor do they have authority to conclude that compliance with a particular regulation is unnecessary. Their function is simply to compare the design with the regulations and to determine whether the design meets the minimum regulatory requirements. If it does not, the FAA inspectors have *no* discretion to accept the design notwithstanding the deficiency. Rather, the Type Certificate *must* be withheld until the manufacturer submits a design modification or other means of correcting the deficiency.

The role of FAA engineers in the type certification process was discussed at length in the depositions of FAA employees Richard Nelson and Rocco Lippis. For example, Mr. Nelson confirmed that CAR 4b.381(d) is clear and that an aircraft *cannot* be type certificated if it does not comply with that regulation. Mr. Nelson testified:

Q. [By counsel for VARIG] And to the extent that those trash containers would not contain fire as a result of those holes, they would not be in compliance with 4b.381(d)?

....

A. THE WITNESS [Mr. Nelson]: I don't know that I understand the question that well, but *the container either does or doesn't contain the fire. There is no in between.*

Q. And if it doesn't contain fire, then it doesn't comply with 4b.381(d) in your view?

A. Yes ....

....

Q. But to be type certificated, the lavatories on an aircraft *must* comply with that regulation?

A. Yes.

(Nelson deposition at 149-50, J.A. 130-31, emphasis added). Mr. Nelson expanded on his description of the certification process later in the deposition:

Q. For the initial certification of a new aircraft, would there be a compliance item for *every regulation that applies to that aircraft*?

. . . .

THE WITNESS: Yes. That is the recommended way to type certificate airplanes, is to have a compliance checklist. *There should be an item for each particular rule.*

Q. Assuming certification of an aircraft now, I take it that a new aircraft design could not be type certificated absent a finding by the FAA of compliance of the lavatories on that aircraft with FAR 25.853(d) [successor to CAR 4b.381(d)]?

A. There is a requirement for the waste containers in the rule that would have to be complied with.

Q. Would that be an item in that certification process?

A. Yes. I retract. They may have an item just covering all of .853. But it could be that they would itemize it.

Q. When you say all of .853, that would include the flammability requirements as well?

A. Yes. That could vary by regions how they handle this.

Q. *But what would not vary is at some point someone would have to review data to show compliance with that regulation both as to the flammability and the containment aspects?*

A. Yes.

. . . .

Q. . . . I take it that was true also during the 707 process, that *someone at the FAA would have had to review data from Boeing showing compliance with the predecessor 4b.381(d).*

A. Yes, there should have been someone reviewing this.

Q. I take it that that review would have to be made for each separate type certificate issued for the various models of Boeing aircraft.

A. The airplane must be in compliance with the rules, yes, so, for each certificate.

(Nelson deposition at 427-30, emphasis added).

Similarly, Mr. Lippis testified that the regulations are "mandatory on . . . the certificating engineer" and "must be complied with." (Lippis deposition at 132-33). The FAA engineers are charged with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81, J.A. 139-40). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*). In certain circumstances, the design review may be performed initially by a Designated Engineering Representative ("DER"), who is an employee of the manufacturer acting as an agent of the FAA. (Nelson deposition at 438-39). But the ultimate responsibility still rests with the FAA engineers to ensure that the aircraft design meets every applicable regulation.

As the government candidly admits, the evidence in the *Varig* case is to the effect that neither the FAA nor anyone else *ever* inspected or reviewed the design of the 707 lavatory trash container to verify compliance with CAR 4b.381(d). Gov't Brief at 37. As part of his post-accident investigation, Richard Nelson searched the FAA's records in an attempt to find evidence that the waste container had been inspected for compliance with CAR 4b.381(d). He was unable to find any such evidence. (Nelson deposition at 139-42, J.A. 129-30). During discovery in the district court, the government was likewise unable to produce *any* evidence that the 707 lavatory

waste container was ever actually inspected or reviewed, despite repeated requests for such evidence by VARIG.

VARIG sought from the United States the identity of the person or persons who reviewed and/or inspected the 707 lavatory waste containers. The United States provided names of several people who "might" have been involved in the inspection. VARIG took the depositions of FAA employees Jack Bulmer, Rocco Lippis and Harold Tanke; but none of the witnesses had reviewed or inspected the trash container, and none could provide any evidence that someone else had performed the review or inspection. VARIG also made repeated requests to the United States for any documents showing that the 707 waste containers had been inspected. The only evidence produced by the government was two documents. One was a letter from former FAA employee W. A. Klikoff to Boeing stating that "final approval of the various interior arrangements [on the 707 model] will be dependent upon our inspection of the completed airplane."<sup>13</sup> The other document was entitled "Check List Interior Arrangement" and was to be filled out by an FAA employee, now deceased, W. B. Spelman. (J.A. 154-55). One of the items listed was "CAR 4b.381(d) CHECK FOR: Fire resistant, covered waste containers." *Id.* The check list was never filled out by Mr. Spelman; and there is no documentary evidence or testimony that he, or anyone else, actually checked, reviewed or inspected the lavatory trash containers in any way prior to type certification of the 707. (Curtiss deposition at 156, J.A. 142). Mr. Nelson testified in his deposition that compliance check lists are normally used by the FAA during the type certification process and that they are maintained in the files after the Type Certificate is issued. (Nelson deposition at 395, 398).

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<sup>13</sup> See Letter from W. A. Klikoff to B. L. Carter dated March 5, 1958, Excerpt of Record in the court of appeals, at 239.

#### D. Disposition in the Courts Below

VARIG commenced this action in the district court to recover for the total destruction of its 707 jet aircraft. VARIG's complaint stated a claim against the government under California's Good Samaritan doctrine. VARIG alleged that the government had undertaken to inspect and issue Type Certificates for commercial aircraft; that VARIG relied upon the undertaking; that the government had negligently performed its undertaking with respect to the Boeing 707; that the FAA had negligently failed to require Boeing to comply with the applicable FARs; that the FAA had negligently issued a Type Certificate for the Boeing 707 when it knew or should have known that its design did not comply with the applicable FARs; that this negligence increased the risk of harm to users and operators of 707s; and that the government's negligence proximately caused the destruction of VARIG's aircraft.<sup>14</sup>

On October 31, 1980, the government moved for summary judgment, arguing that VARIG's First Amended Complaint should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a), 2680(h). In opposition to the motion, VARIG submitted, among other things, the affidavit of its Manager of Engineering and Maintenance Base, Frederico J. Ritter. With regard to VARIG's allegations of reliance, Mr. Ritter stated:

When a manufacturer like BOEING has a 'type certificate' for an aircraft model, such as the BOEING 707, VARIG relies upon the fact that BOEING has completed all of the tests and other requirements laid down by the U.S. FAA, in obtain-

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<sup>14</sup> First Amended Complaint ¶¶ 11-15 (J.A. 19-21). All parties agree that California law governs this action.



ing that type certificate. VARIG neither seeks nor reviews the mass of detailed design drawings, data, tests and other documentation submitted by BOEING to the FAA when applying for such a type certificate. Such a review is completely beyond the scope and purpose of VARIG's engineering department. Similarly, when a manufacturer like BOEING has completed an aircraft which has been built pursuant to a type certificate, such as PP-VJZ, the U.S. FAA physically inspects that aircraft to see that it complies with the U.S. FAA's Federal Air Regulations ('FAR's') before issuing the individual aircraft an 'airworthiness certificate.' . . . The airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with the regulations. Neither does the Brazilian Government when the aircraft is registered in Brasil. . . . In summary, the airline purchases an aircraft which it assumes was certificated to a certain level of airworthiness. Thereafter, the job of the airline's engineering and maintenance department is to *maintain* that level of airworthiness and not allow it to degrade.

(Ritter Affidavit ¶ 3, J.A. 150-51). The Ritter Affidavit remains completely uncontradicted in this case.

The district court granted the motion for summary judgment, essentially agreeing with all of the government's arguments. Appendix to Petition for Certiorari ("Pet. App.") at 8a-13a. However, the district court rejected proposed findings of fact submitted by the government to the effect that there was no negligence by the FAA, no reliance by VARIG, and no increase in the risk of harm to VARIG.<sup>15</sup>

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<sup>15</sup> The district court struck out the following proposed findings of fact submitted by the government:

13. The United States of America's inspection and certification of the Boeing 707 aircraft did not increase the risk of harm to Plaintiffs.

On appeal, the Ninth Circuit reversed. 692 F.2d 1205 (9th Cir. 1982) (Pet. App. 1a-7a). The court of appeals held that the government could be held liable for negligent inspection and type certification of commercial transport category aircraft under California's Good Samaritan doctrine, and that neither the discretionary function exception nor the misrepresentation exception of the Tort Claims Act barred the action. At the same time, the court of appeals also handed down its decision reaching the same result in the *United Scottish* case. 692 F.2d 1209 (9th Cir. 1982) (*United Scottish* Pet. App. 1a-6a).

### SUMMARY OF ARGUMENT

1. For the last 30 years the government has been arguing that it should not have any liability under the Federal Tort Claims Act in connection with "uniquely governmental functions." The argument finds no textual support in the Act itself and has been thoroughly repudiated by a consistent line of decisions in this Court. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). The government makes the same argument again here, although it offers no compelling reasons why the earlier decisions should now be overruled. The government appears to be primarily concerned with the liability it may incur as a result of negligent FAA review and inspection in connection with commercial aircraft type certification activities. If so, the proper remedy is a request to Con-

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<sup>15</sup> [Continued]

14. The United States of America's inspection and certification of the Boeing 707 aircraft did not induce reliance by the Plaintiffs.
17. There was no negligence on the part of the United States of America or any of its employees that was a proximate cause of this accident.

Excerpt of Record in the court of appeals, at 18. Appendix B to the government's petition in this case correctly omits findings of fact Nos. 13 and 14, above, but erroneously includes finding No. 17, above. Pet. App. 10a. The error is corrected at J.A. (I) n.\*.

gress for an amendment to the Tort Claims Act, not a request that this Court create an exception to the Act where none now exists.

In accordance with *Indian Towing*, the United States can be held liable under the Good Samaritan doctrine of the applicable state law. All parties agree that this case is governed by California law and that California has adopted the Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. The government raises some rather fine points about the application of the *Restatement* to the facts of this case. Yet the pertinent law, including particularly the *Restatement* Illustrations, clearly supports the lower court's determination that the FAA's review and inspection in connection with aircraft type certification activities fall within California's Good Samaritan doctrine. The government also questions whether VARIG reasonably relied upon the FAA's undertaking to inspect and certificate commercial aircraft. The affidavit of Frederico J. Ritter, Manager of VARIG's Engineering and Maintenance Base, establishes the requisite reliance beyond any doubt. Ritter's affidavit remains completely uncontradicted in the record, and it clearly refutes the government's reliance argument.

2. When a federal employee's activities are directed and constrained by specific, mandatory agency safety regulations pertaining to fire protection in aircraft, he is stripped of all policy-making discretion; and the discretionary function exception, 28 U.S.C. § 2680(a), does not apply. The government agrees with this basic principle; indeed it could hardly disagree in the light of the case law and the structure and wording of section 2680(a). In the present case, CAR 4b.381(d) deprives the FAA engineers and inspectors of all discretion. They are bound to apply and enforce the regulation as it is written; no room is left for any policy judgments or public interest determinations. They especially have no discretion to ignore, disregard or overlook the requirements of a fire protection

safety regulation, as the evidence shows they did here with respect to the Boeing 707. Thus the court of appeals properly rejected the government's discretionary function defense in this case.

The government nevertheless contends that the exception should apply here because the FAA engineers and inspectors do not check for compliance with every regulation but rather perform a "spot check" of the aircraft design submitted for type certification. As a result, the argument goes, FAA engineers and inspectors must exercise discretion in deciding which design features should be reviewed and which regulations should be enforced before the issuance of a Type Certificate. This is an entirely new argument that was never made in the courts below; it cannot properly be raised here for the first time. Beyond that, the argument is wrong as a matter of fact. The record evidence in this case, including extensive testimony by FAA employees, shows that there is no "spot check" procedure for type certification of commercial aircraft. The FAA engineers and inspectors are required to ensure that *every* design feature of the aircraft is checked for compliance with *every* applicable regulation. They have no discretion to disregard *any* of the safety regulations. The "spot check" defense cannot be sustained on the facts in this record.

3. The government's position on the misrepresentation exception, 28 U.S.C. § 2680(h), is foreclosed by this Court's recent decision in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). Like the plaintiff in *Block*, VARIG has asserted a property damage claim that does not depend upon misstatements contained in any report, certificate or other document issued by the government. Rather, the gravamen of VARIG's claim is that the FAA engineers and inspectors negligently reviewed and inspected the design drawings, data, prototypes and other matter submitted by Boeing with its application for a Type Certificate for the 707, and negligently failed to require Boeing to comply with the applicable safety regu-

lations, including CAR 4b.381(d), prior to the issuance of a Type Certificate for the 707. This case is on all fours with *Block v. Neal*, and the misrepresentation exception is inapplicable here, just as it was in *Block*.

## ARGUMENT

### I. THE GOVERNMENT CAN BE HELD LIABLE FOR THE NEGLIGENCE OF FAA EMPLOYEES IN REVIEWING AND INSPECTING, FOR TYPE CERTIFICATION PURPOSES, THE DESIGN OF COMMERCIAL AIRCRAFT

The government's opening argument is that it cannot be held liable under the Tort Claims Act for the FAA's negligence in the review and inspection, for type certification purposes, of the design of commercial aircraft because these are "core governmental activities." In the alternative, the government insists it cannot be held liable because the California Good Samaritan doctrine is inapplicable to the facts of this case. Gov't Brief at 21-38. Neither argument is at all persuasive.

#### A. There Is No Exception In The Tort Claims Act for "Core Governmental Activities"

The government begins by arguing that it can have no liability here because the FAA's inspection and certification of aircraft is a "quintessentially sovereign function" falling within "a core of governmental activities that are never engaged in by private citizens." Gov't Brief at 23-24 & n.21.<sup>16</sup> These activities, the government urges, must

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<sup>16</sup> The government is simply wrong in asserting that this supposedly "governmental" function is "never engaged in by private citizens." The district court in *United Scottish* found as a fact that private persons inspected commercial aircraft for airworthiness before 1926, when the federal government preempted the field. *United Scottish*, Pet. App. 18a, 24a. In affirming, the court of appeals left that finding untouched; and the government has made no direct attempt to rebut it here. In this respect, inspection of aircraft is similar to air traffic control services, which were provided by the private sector until the government took over that function.

[Footnote continued on page 23]

be preserved "inviolate from tort suits." *Id.* at 23. To accept the government's argument would require the Court to overrule a line of decisions stretching back almost 30 years. The seminal case is *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), in which the government insisted that it could not be liable because operation of a lighthouse is a "uniquely governmental function" that private persons do not perform. 350 U.S. at 64. The Court rejected this argument, noting that it would "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. As the Court recognized, *all* governmental activity "is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* Thus, to distinguish between "governmental" and "non-governmental" activities would be "to draw distinctions so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.* at 68. The Court also pointed out that to accept the government's argument would be to make liability turn on "a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 67. The Court was unwilling to attribute any such "bizarre motives" to Congress, noting that "[t]he broad and just purpose which the statute was designed to effect was to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. . . ." *Id.* at 68.

The "governmental function" defense was also urged in an early air traffic controller case entitled *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.

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<sup>18</sup> [Continued]

See *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 74 (D.C. Cir.), *aff'd mem. sub nom., United States v. Union Trust Co.*, 350 U.S. 907 (1955). As in the present case, the "governmental function" defense was rejected in *Union Trust*. In any event, the Court has made it clear that Tort Claims Act liability does not turn on "the presence of identical private activity." *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955).



1955). The court of appeals rejected the government's claim that it could not be held liable because its controllers "perform governmental functions of a regulatory nature that are not performed by individuals." 221 F.2d at 73. The government raised the issue again in its petition for certiorari,<sup>17</sup> and this Court summarily affirmed on the authority of the *Indian Towing* decision. *United States v. Union Trust Co.*, 350 U.S. 907 (1955). For purposes of this case, there is no conceivable distinction between the FAA's air traffic controllers and its type certification engineers and inspectors. They both perform functions that are "governmental" to the same degree, and they both are charged with the duty of promoting safety in air transportation. If, as this Court held, there is no "governmental function" defense for air traffic control activities, there logically can be none for FAA review and inspection activities connected with the type certification process for commercial aircraft.

As the government concedes, the Court similarly rejected the "governmental function" defense in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), involving Forest Service fire-fighting activities, and in *United States v. Muniz*, 374 U.S. 150 (1963), involving supervision and care of inmates in a federal prison. See Gov't Brief at 24. If fighting fires and running prisons are not "core governmental activities," then nothing is. If the government can be held liable for negligence in performing those kinds of activities, it surely can be held liable for the FAA's negligent review and inspection in connection with the type certification of commercial aircraft. As this Court said in *Rayonier*: "It may be that it is 'novel and unprecedented' to hold the United States ac-

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<sup>17</sup> The government's argument concerning control towers, made to this Court in its petition for certiorari in the *Union Trust* case almost thirty years ago, is nearly identical to the argument made in its brief in this case concerning FAA type certification activities. See Petition for a Writ of Certiorari at 25, *United States v. Union Trust Co.*, 350 U.S. 907 (1955).



countable for the negligence of its fire-fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented liability." 352 U.S. at 319.

The government attempts to distinguish these cases on the ground that it was "critical" to each case that the government agency involved "had assumed direct, operational responsibility for the activity that caused the injury." Gov't Brief at 24. Yet nothing in the Court's opinions in these cases suggests that the factor identified by the government was in any way critical—or even material—to the result reached. Furthermore, it is difficult to see how the distinction drawn by the government separates this case from the others that have gone before. For example, the regulation and control of air traffic hardly seems more "direct" or "operational" than the regulation and control of aircraft design and construction. The same can be said of the supervision of federal prisoners. The government is no more the direct and operational cause of an injury inflicted by one inmate on another than it is the direct and operational cause of an airplane crash resulting from an unsafe component that should have been detected by the FAA. In short, the distinction urged by the government simply will not withstand scrutiny.

The government points to nothing in the text of the Act itself that would justify reversing 30 years of jurisprudence and adopting a new immunity for "core governmental activities." We are referred only to the provision in 28 U.S.C. § 2674 that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." Gov't Brief at 21. Yet the government cited the *exact* same statutory provision in support of *exactly* the same argument in *Indian Towing*. 350 U.S. at 64-65. The Court rejected the argument in that case, and there is no reason to accept it here.

Moreover, the government provides no sound policy reasons for creating a new "governmental function" de-

fense. The government never explains why it should be free from liability for negligent review and inspection of aircraft designs in connection with the type certification of commercial aircraft. All we can extract from the government's brief is a generalized concern that tort suits should not be permitted to disrupt and interfere with the important regulatory functions of the federal government. Yet this concern is addressed by the discretionary function exception, 28 U.S.C. § 2680(a), which is admittedly "comparable" to the new exception that the Court is asked to create here. See Gov't Brief at 23 n.21. It would be wholly inappropriate to read a broad new exception into the Tort Claims Act when the general area of concern is already addressed by one of the thirteen specific exceptions that Congress listed in section 2680.<sup>18</sup> As the Court has held: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957).<sup>19</sup>

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<sup>18</sup> As will appear in the next section of this brief, the discretionary function exception does not bar VARIG's claims in this case.

<sup>19</sup> In addition to its attempt to distinguish the Court's decisions rejecting a "governmental function" defense, the government argues that the legislative history of the Tort Claims Act supports its argument. Gov't Brief at 22. A full reading of the remarks of Rep. Gwynne, portions of which are cited in the government's brief, shows that he was referring to the discretionary function exception to the Act, and not to a "governmental function" defense. See 86 Cong. Rec. 12,021 (1940). Furthermore, there are numerous references in the legislative history to the fact that the Act was intended to include "the broad field of common law torts," and to the widening scope of the activities of the federal government and its increasing intrusiveness into private business and daily life. See *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 37 (1942); 86 Cong. Rec. 12,018 (1940) (remarks of Rep. Celler); 69 Cong. Rec. 2186, 2187, 3118, 3123 (1928) (remarks of Reps. Underhill, Box); 67 Cong. Rec. 7526, 7529, 11,092 (1926) (remarks of Reps. Underhill, Celler); H.R. Rep. No. 206, 69th Cong., 1st Sess. 10 (1926).

The government also attempts to support its position by citing a long list of statutes under which various federal agencies perform inspection and/or certification activities. Gov't Brief at 26-27 & nn.25-29. From this, the government argues that its potential liability will be "staggering" unless the present case is reversed. Gov't Brief at 28. This, of course, is the same argument that the government advanced unsuccessfully in *Rayonier, supra*. In that case the Court said:

The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. . . . But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed.

352 U.S. at 319, 320. *Indian Towing* also makes it clear that the Court should not attempt to act as "a self-constituted guardian of the Treasury" and "import immunity back into a statute designed to limit it." 350 U.S. at 69. If the Tort Claims Act is to be altered because of the "heavy burden" it may impose on "the public treasury," then "that is a function for the same body that adopted it." *Rayonier, supra*, 352 U.S. at 319, 320.

Moreover, the potential liability for acts of other agencies under other statutes is not before the Court now. *This* case involves only the government's liability for the negligence of FAA engineers and inspectors under the particular facts and circumstances presented by the record here. The other agencies listed by the government may or may not give rise to liability under their statutes

and regulations and the applicable state law. The issue will have to be resolved in other cases that properly raise the question.<sup>20</sup>

Finally, it is not at all clear that an affirmance here will lead to unduly burdensome liability even with respect to the FAA's activities. The government will not be held liable as an insurer or on any theory of liability without fault. See Gov't Brief at 28-29. The plaintiff can only prevail by presenting sufficient evidence to persuade a district judge, sitting without a jury, that the government was negligent under the applicable state law. In the *Varig* case, the evidence shows that the FAA was required to review and inspect the Boeing 707 lavatory waste container design to ascertain that it complied with a mandatory FAA fire protection safety regulation before issuing a Type Certificate for the Boeing 707; that the FAA failed to do so; and that the design did not, "by any stretch of the imagination," comply with the FAA's own safety regulations. The evidence in the *Varig* case is more than sufficient to make out a case of negligence under California law. In no sense is the government an insurer here; it will simply be held responsible for the consequences of its negligence, as Congress intended when it passed the Tort Claims Act.

Even if the government is found liable, it will often be able to obtain contribution or indemnity from other parties. When the FAA is negligent in failing to discover a defective aircraft design, the aircraft manufacturer is usually negligent as well for having conceived the faulty design and tendered it to the FAA for type certification. There may also have been negligence on the part of a component supplier. The government can—and doubtless will—seek comparative equitable contribution or indemnity from such parties under the applicable state law by

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<sup>20</sup> For instance, in all but one of the cases cited by the government in nn. 25 through 29 of its brief, the *government* prevailed. The other case is presently before the Third Circuit on appeal. See Gov't Brief at n. 25.

impleader or by a separate action.<sup>21</sup> See *United States v. Yellow Cab Co.*, 340 U.S. 543, 551-52 (1951); *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441 (1978); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

Furthermore, where the passengers or their beneficiaries sue multiple defendants in litigation arising out of air crash disasters, the government can cross-claim against the operator, the manufacturer and/or any other defendants for contribution or indemnity; or it may obtain the benefit of any settlements entered into between the plaintiffs and any of the other defendants. See, e.g., Section 877, California Code of Civil Procedure.<sup>22</sup> In the litigation arising from the VARIG crash, for example, the government notes that the *Mascher* plaintiffs have settled their suits against Boeing, Seaboard World Airlines and five component manufacturers. Gov't Brief at 15 n.16. Should the sum of those settlements exceed what the district court determines to be the plaintiffs' damage here, the government will not be liable to them for any amount. Thus, the government's ultimate liability in these cases is not likely to be "staggering" at all.

#### **B. The Government Is Liable Under The Good Samaritan Doctrine**

The government contends, in the alternative, that even if its "core governmental activity" defense is rejected, there still can be no liability because the California Good Samaritan doctrine is inapplicable under the particular

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<sup>21</sup> In an article which the government cites in its brief for other purposes (see Gov't Brief at 41, 44) the authors, who are FAA lawyers, acknowledge that the government will generally seek indemnity in aircraft certification cases. See Harrison & Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 44-45 (1978).

<sup>22</sup> Section 877, California Code of Civil Procedure, provides that when a plaintiff settles with one tortfeasor, his claim against the remaining tortfeasors is reduced by the amount of the settlement.

facts and circumstances of this case. Gov't Brief at 29-38. The Good Samaritan doctrine is inapplicable here, in the government's view, for two basic reasons: (1) The FAA performed no direct, necessary service for VARIG; and (2) VARIG did not rely upon the FAA's undertaking to inspect and certificate aircraft. Neither argument can be sustained.<sup>23</sup>

The government concedes that this case is controlled by the California Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. Gov't Brief at 29-30. See *Coffee v. McDonnell Douglas Corp.*, 8 Cal. 3d 551, 105 Cal. Rptr. 358, 503 P.2d 1366 (1972). Indeed, it could hardly do otherwise in the face of this Court's clear language in *Indian Towing*, *supra*. In that case the Court said: "[I]t is horn-book tort law that one who undertakes to warn the public of dangers and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." 350 U.S. at 64.<sup>24</sup> The government argues, however, that California law would permit no recovery because the FAA performed no services "directly" to VARIG, but rather to the "public as a whole," and because the injury suffered by VARIG is "so far removed" from the FAA's negligence. Gov't Brief at 30-32. In support of its conten-

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<sup>23</sup> Since the Good Samaritan issues are a matter of local state law, it would be appropriate to defer to the court of appeals' interpretation and application of the law on these issues. See *Runyon v. McCrary*, 427 U.S. 160, 181-82 (1976); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949).

<sup>24</sup> Since *Indian Towing* the lower courts have uniformly held that "when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently." *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 236 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). In *Ingham*, an air traffic control case, the Second Circuit said: "[W]e can give little weight to the government's claim that since its initial decision to provide weather information was a gratuitous one, it could proceed with impunity to violate its own regulations and act in a negligent manner." 373 F.2d at 236.



tion, the government quotes the Ninth Circuit's holding in *Roberson v. United States*, 382 F.2d 714, 720 (9th Cir. 1967), that Good Samaritan liability attaches when "the purpose of the action was to render a direct service to the person who was injured, or to persons of that class" (emphasis added).<sup>25</sup> Gov't Brief at 30. The *Roberson* court did *not* hold that the service had to be undertaken specifically for the benefit of the particular person who was injured. Instead, the plaintiff need only be one of the class of persons for whose benefit the services were performed. In the present case, Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, testified at his deposition that the "principal beneficiaries" of the FAA certification process are "the passengers and the operators of the airplanes" that the FAA inspects and certifies. (Lippis deposition at 181-82). Similarly, the FAA's Melvin Beard testified at his deposition that the "intended beneficiaries" of the certification process are "the passengers and the operators of the airplane." (Beard deposition at 114-15). VARIG is clearly a member of that class of beneficiaries.

Furthermore, the proposition urged by the government finds no support in the *Restatement* itself. Neither section 323 nor section 324A provides that the services must be undertaken for the specific benefit of a particular person, and the Illustrations accompanying these sections are wholly to the contrary. For example, Illustrations 2, 3 and 4 to section 324A all establish liability for inspection activities undertaken for the benefit of the general public or a large class of persons. The services were not performed for the particular benefit of a specific person. The present case is analogous to the *Restatement* Illustrations. VARIG is plainly a member of the class benefited by the FAA's inspection and certification activities,

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<sup>25</sup> The *Roberson* case applied Arizona law, not California law. However, the Ninth Circuit concluded that Arizona would follow the *Restatement* formulation of the Good Samaritan doctrine. See 382 F.2d at 718.



and it is entitled to recover under the Good Samaritan doctrine when it suffers injury as a result of FAA negligence.

There is likewise no basis for the government's claim that VARIG cannot recover because it is too "remote" and too far "removed" from the FAA's negligence. Gov't Brief at 32-33. Certainly it is no defense that the crash of PP-VJZ did not occur until several years after the FAA's negligence. That is often true in tort cases, but it does not exonerate the defendant from liability. Indeed, the government cites no authority whatsoever for its novel theory that the passage of time alone bars recovery; and the law of California is to the contrary.<sup>26</sup> The interval between the FAA's negligence and VARIG's injury is simply irrelevant for purposes of this case. Similarly, it is no defense that VARIG was "remote" in the sense that it had no direct interface with the FAA and the certification process for the Boeing 707. The same was true of the injured parties in the *Restatement* Illustrations mentioned above, yet the remoteness was no bar to recovery. Here again, the government is unable to cite any case holding that there must be direct dealings between the Good Samaritan and the injured party.<sup>27</sup>

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<sup>26</sup> Under California law, a negligence cause of action accrues when the injury occurs. *Oakes v. McCarthy Co.*, 267 Cal. App. 2d 231, 73 Cal. Rptr. 127, 141 (1968). VARIG's cause of action accrued on July 11, 1973, when PP-VJZ crashed. VARIG commenced this action within the limitations period specified by the Tort Claims Act. 28 U.S.C. § 2401(b).

<sup>27</sup> The government's "remoteness" argument in this case is ironic in view of the following statement made by a former administrator of the FAA to a "Blue Ribbon Panel on Aircraft Certification":

American aircraft and components are not important just to America, as the export figures I mentioned a moment ago clearly reflect. In 1978, the number of turbine-engine aircraft used worldwide in commercial service was slightly over 7,500. Over 68% of these aircraft were built by American manufacturers.

[Footnote continued on page 33]

The government also attempts to escape liability on the theory that the FAA's inspection and certification activities were not "necessary" to protect VARIG or anyone else because manufacturers and operators of aircraft have the primary responsibility for aviation safety. Gov't Brief at 33. This argument makes no sense. Obviously Congress would not have enacted the Civil Aeronautics Act of 1938, 52 Stat. 973, and then the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, if it thought the legislation was unnecessary. Congress would not have directed the FAA "to promote safety of flight of civil aircraft," 49 U.S.C. § 1421, unless it found a need for such administrative action.<sup>28</sup> Congress also directed the FAA to issue aircraft Type Certificates only upon a finding that the design complies with the agency's mandatory safety regulations. 49 U.S.C. § 1423(a)(2). Congress clearly thought this certification process necessary to promote public safety, and the government should not be heard now to argue that it was an "unnecessary service."<sup>29</sup>

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<sup>27</sup> [Continued]

It is readily apparent that there exists throughout the world a healthy respect for U.S. aviation products. That respect is well founded. Our international posture in aviation has been aided in great measure by the safety of the aircraft we produce, guided by stringent safety standards which are held in high esteem by the world's aviation authorities.

The Honorable Langhorne Bond, Administrator of the Federal Aviation Administration, *Statement before the Blue Ribbon Panel on Aircraft Certification* (January 21, 1980) (emphasis added).

<sup>28</sup> As the report of a special House subcommittee reviewing FAA performance stated: "Unlike some other agencies of the Government, whose responsibilities center on economic regulation, the responsibilities of the FAA directly involve human life and safety." Special Subcomm. on Investigation of House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess., *Air Safety: Selected Review of FAA Performance 1* (Subcomm. Print 1975) (hereinafter cited as "Selected Review").

<sup>29</sup> The government also makes the remarkable suggestion that the FAA was intended only to "encourage" private parties to comply

[Footnote continued on page 34]

In addition, the FAA is not relieved of its Good Samaritan duties simply because aircraft manufacturers and operators also have safety responsibilities. Once again, the *Restatement* Illustrations completely undercut the government's position. For example, Illustration No. 2 accompanying section 324A states:

2. The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

Obviously the Telephone Company in this illustration would be primarily responsible for the safety of the poles it erects along a public highway. Nevertheless, the inspector is liable to members of the public who are injured as a result of his negligence in inspecting the poles. The same is true here. The government is not relieved of liability merely because Boeing also has a responsibility to design safe aircraft.<sup>30</sup>

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<sup>29</sup> [Continued]

"voluntarily" with the FARs. Gov't Brief at 31. This is a clear misreading of the governing statute. It is unlawful to operate an aircraft without a current Airworthiness Certificate in effect. 49 U.S.C. § 1430(a)(1). An Airworthiness Certificate may be issued only if the aircraft conforms to the Type Certificate. 49 U.S.C. § 1423(c). A Type Certificate may be issued only if the aircraft design meets all applicable FARs. 49 U.S.C. § 1423(a)(2). Thus compliance with the FARs is in no sense "voluntary."

<sup>30</sup> A House committee report on the FAA's type certification process disagreed with the government's view that the ultimate responsibility for air safety lies with the airline industry. It said: "Despite its overall excellent safety record, the industry should not be left to regulate itself. . . . [T]he FAA remains the sole guardian of public safety." House Comm. on Government Operations, *A Thorough Critique of Certification of Transport Category Aircraft by the Federal Aviation Administration*, H.R. Rep. No. 924, 96th Cong., 2d Sess. 10 (1980) (emphasis added) (hereinafter cited as "Critique").

The government's final attack on the Good Samaritan doctrine focuses on the element of reliance. Gov't Brief at 34-37.<sup>31</sup> The argument, essentially factual in nature, is that VARIG did not reasonably rely upon the FAA's undertaking to inspect and certificate aircraft. Yet the government completely ignores the lengthy affidavit of Frederico J. Ritter, VARIG's Manager of Engineering and Maintenance Base, which is quoted *supra*, p. 17-18. That affidavit remains *completely uncontradicted* in the record, and it shows conclusively that VARIG relied upon the FAA's inspections of commercial aircraft.<sup>32</sup>

The government argues that VARIG should not have relied upon the FAA because the aircraft type certification process is nothing more than a "spot check" inspection that does not purport to ensure compliance with all applicable safety regulations. Gov't Brief at 37. This "spot check" defense is an entirely new argument that was *never* made below and cannot properly be raised here

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<sup>31</sup> The plaintiff can recover under the *Restatement* if the defendant's negligence increases the risk of harm or if the plaintiff relies upon the defendant's undertaking. The government dismisses the first alternative as "plainly inapplicable." Gov't Brief at 34. The government glosses over this point far too quickly. The risk of harm was increased here in that, if the FAA had required Boeing to comply with CAR 4b.381(d), VARIG would not have been unwittingly operating a dangerously defective aircraft. As noted, the district court specifically rejected a proposed finding of fact to the effect that there was no increase in the risk of harm. See *supra* n. 15. This would clearly be a contested issue of fact which could not be decided on a motion for summary judgment. In any event, the evidence of reliance is so strong that we need not dwell on this point.

<sup>32</sup> Throughout its brief, the government attempts to recharacterize VARIG's reliance as reliance upon the FAA's Type and Airworthiness Certificates. See, e.g., Gov't Brief at 36. The Ritter affidavit makes clear, however, that VARIG actually relied upon the FAA's review and inspection of Boeing's design drawings, data, tests and prototypes, and upon the fact that Boeing was required to meet all of the FAA's requirements. The physical pieces of paper embodying the Type and Airworthiness Certificates are at most incidental to VARIG's reliance.

for the first time. *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137, 1143 n.7 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Moreover, the government's argument is unsupported by affidavits or any other evidence inserted in the record and presented to the district court in support of the government's motion for summary judgment. To the contrary, the government's position is *directly* contradicted by the evidence that is in the record. The deposition testimony of the present and former FAA employees all shows that the type certification process is not a spot-check inspection. See *supra*, p. 13-15. Rather, compliance with *all* FARs is mandatory; and the FAA engineers must verify compliance with all FARs before the aircraft can be type certificated. The pertinent FAA testimony is discussed more fully in the next section of this brief in connection with the discretionary function exception. Suffice it to say here that the government's spot-check defense is completely inconsistent with the facts presented to the courts below. In any event, the reasonableness of VARIG's reliance is surely a contested issue of fact that could not properly be decided against VARIG in the context of a summary judgment motion.

Finally, the government doubts VARIG's reliance because VARIG is a Brazilian airline but did not request an Export Certificate of Airworthiness from the FAA for PP-VJZ. Gov't Brief at 36 n.35.<sup>33</sup> Again, the govern-

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<sup>33</sup> There is an undercurrent throughout the government's brief suggesting that it is somehow wrong for Brazilian citizens to seek recovery under the Tort Claims Act. See, e.g., Gov't Brief at 7, 14-15, 17, 28, 34-36. There is nothing in the Act precluding recovery by foreign citizens; the government does not contend otherwise. Indeed, an earlier version of the Act excluded "claims of aliens arising in foreign countries." See *Tort Claims Against the United States: Hearings on S. 2690 Before the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 39 (1940). The reference to aliens was deleted from the Act as passed, and the exclusion was broadened to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The district court here determined in a separate ruling that VARIG's claims did not arise in a foreign country, and the government chose not to contest that ruling on appeal.

ment's argument is not supported by the record. The FAA's Melvin Beard testified that an Export Certificate is "not required" and that "many products are exported abroad without us having issued an export certificate of airworthiness." (Beard deposition at 141). In addition, the Ritter affidavit demonstrates that VARIG does not rely particularly upon pieces of paper such as Type and Export Certificates. Rather, it relies upon the type design review and inspection process that the FAA undertakes before allowing any commercial aircraft to be produced and sold in the United States. Here, VARIG knew that the Boeing 707 had been through this type review and inspection process; and no certificate was necessary to engender VARIG's reliance.<sup>34</sup> The Export Certificate issue is clearly a red herring.

## II. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT BAR VARIG'S CLAIMS

A good starting point for analysis of the discretionary function exception, 28 U.S.C. § 2680(a), is provided by the government's oral argument before this Court in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). During that argument, counsel for the government described the discretionary function exception as follows:

If there were a regulation in this case that said that the government must discover every defect and must make every defect corrected . . . then it would seem to me we would be hard pressed to argue that that is a discretionary decision, *because the regulation will have essentially taken away all our discretion*. But if the regulation *merely suggests* that we should have inspections . . . then it would seem clearly to be within the discretionary function exception.

Transcript of Proceedings before the Supreme Court (Jan. 19, 1983), at 13-14, *Block v. Neal*, 103 S.Ct. 1089 (March 7, 1983) (emphasis added).

<sup>34</sup> Indeed, VARIG purchased PP-VJZ from Seaboard World Airways, and Seaboard could not have operated the aircraft if it had not been through the FAA's type certification process. 49 U.S.C. §§ 1423, 1430(a) (1).



As the government admits, when a mandatory agency regulation constrains and directs the activities of federal employees, their discretion has been eliminated; and they cannot fairly be said to be performing a discretionary function. In this respect, government counsel was simply echoing a long line of cases holding that the negligent implementation of regulations is not protected by the discretionary function exception. *See, e.g., Hylin v. United States*, No. 81-2931 (7th Cir. Aug. 23, 1983) (negligent inspection of a clay mine and failure to enforce mandatory safety standards required by the Mine Safety Act not within discretionary function exception); *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (enforcement of safety regulations governing manufacturer of explosives not discretionary); *Loge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982) (no discretion to disregard mandatory regulatory commands governing licensing of polio vaccines); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (same); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (no discretion to disregard air traffic control regulations); *United Air Lines v. Wiener*, 335 F.2d 379, 394-95 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (no discretion to violate regulations concerning segregation of air traffic). *Cf. Hatahley v. United States*, 351 U.S. 173 (1956) (violation of livestock grazing regulations).

To be sure, the agency decision to issue regulations in the first place may be discretionary; and the same may be true of the agency determination as to what provisions the regulations should contain. *See, e.g., George v. United States*, 703 F.2d 90, 92 (4th Cir. 1983) (FAA failure to adopt a certain type of fuel system regulation); *Garbarino v. United States*, 666 F.2d 1061, 1065 (6th Cir. 1981) (FAA failure to adopt crashworthiness regulations). Once the regulations are in place, however, the discretion is at an end. As the Seventh Circuit recently



said in *Hylin, supra*, slip op. at —: “[W]here . . . the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policymaking is not present.” The government must implement its own regulations with reasonable care; it has no discretion to ignore, disregard or violate those regulations.

The dichotomy between developing regulations and executing them is amply supported by the text of the Tort Claims Act itself. Section 2680(a) provides:

(a) Any claim based upon an act or omission of an employee of the Government, *exercising due care*, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(Emphasis added). This section on its face clearly immunizes two different types of conduct: (1) the execution of a statute or regulation while “exercising due care;” and (2) the performance of a discretionary function or duty. See *Hatahley v. United States*, 351 U.S. 173, 181 (1956). If section 2680(a) encompasses the *careless* execution of a regulation, as the government urges here, then the phrase “exercising due care” in the first prong of the section becomes superfluous. The government’s interpretation therefore cannot be correct. The first prong of section 2680(a) was intended to prevent plaintiffs from using the Tort Claims Act to test the validity of properly executed statutes and regulations. *Dalehite v. United States*, 346 U.S. 15, 33 (1953). By inserting the phrase “exercising due care,” Congress clearly manifested an intent that the immunity should not be preserved where the plaintiff accepts the validity of the statute or regulation and simply challenges the care with which the statute or regulation has been executed.

The second prong of section 2680(a) deals with discretionary functions, such as the "initiation of programs and activities," the establishment of "plans, specifications or schedules of operations," and other activities where "there is room for policy judgment and decision." *Dalehite v. United States*, *supra*, 346 U.S. at 35-36. Thus the second prong complements the first in that it also protects the development of regulations and policy choices concerning their contents. But the second prong does not address the government's liability for careless execution of regulations once they have been promulgated.<sup>35</sup>

In the present case, VARIG does not challenge the FAA's decision to promulgate its safety regulations in general or CAR 4b.381(d) in particular. Nor do we challenge the content of CAR 4b.381(d). Rather, VARIG's claim is based upon the FAA's complete lack of due care in implementing and executing this mandatory fire protection safety regulation with respect to the Boeing 707. The claim thus falls conceptually within the first prong of section 2680(a). We are dealing here with the execu-

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<sup>35</sup> The government argues that its broad reading of the discretionary function exception is supported by the legislative history of the Tort Claims Act because that exception in the final version of the Act eliminated earlier exemptions granted to the FCC and SEC. From this the government argues that the discretionary function exception was meant to bar "'claims against Federal agencies growing out of their regulatory activities.'" Gov't Brief at 40. A review of the legislative history shows that the scope of the discretionary function exception was not intended to be as broad as the single snippet quoted by the government would suggest. In explaining the earlier exemptions for the FCC and SEC, the Special Assistant to the Attorney General noted that they were designed to preclude liability of the government should those agencies issue cease and desist orders which were later reversed by the courts. Not all regulatory activity was to be exempt, but only those activities requiring policy judgments which could be reversed later. See *A Bill To Provide for the Adjustment of Certain Claims Against the United States and To Confer Jurisdiction in Respect Thereto on the Court of Claims and the District Courts of the United States, and for Other Purposes: Hearings on S. 2690 Before a Subcomm. of the House Comm. on the Judiciary, 76th Cong., 3d Sess. 48-49 (1940).*

tion of a mandatory regulation—a regulation that the FAA allegedly executed *without* “exercising due care.” The protective cloak of section 2680(a) is therefore unavailable to the government. Certainly the case does not invoke the second prong of section 2680(a). The establishment of programs, plans and specifications is not at issue here, nor did the FAA engineers and inspectors have room for policy judgment and decision in executing CAR 4b.381(d). The FAA inspectors had *no* discretion to modify or disregard the regulations; they were simply charged with the mechanical, operational task of applying the regulations to the aircraft at hand. As FAA employee Rocco Lippis testified at his deposition, FAA regulations are “mandatory on . . . the certificating engineer,” who is required to “check into every item” to ensure compliance. (Lippis deposition at 132, 37). This is not a discretionary function under the language of the Act or any of the relevant prior decisions of this Court or the lower courts.

The government does not appear to dispute these basic legal principles governing the Tort Claims Act and the discretionary function exception. Instead, the government makes a factual argument based on its conception of the FAA type certification process. The argument is divided into three main contentions: (1) that the FAA engages in a discretionary weighing of the “public interest” in deciding whether to issue a Type Certificate (Gov’t Brief at 41-42); (2) that the application of the FARs during type certification of commercial aircraft calls for the exercise of subjective and predictive engineering judgment (Gov’t Brief at 42-43); and (3) that prior to type certification the FAA cannot and does not check an aircraft type design for compliance with *all* FARs, but rather engages in a discretionary “spot check” for compliance (Gov’t Brief at 43-46). Each of the government’s contentions is wholly unsupported by the record evidence in this case and must be rejected.<sup>36</sup>

<sup>36</sup> The government also argues in passing that if the inspection had been performed by a DER, there could be no liability because

[Footnote continued on page 42]

First, there is no evidence that the FAA engages in any sort of delicate or judgmental weighing of the public interest in deciding whether a Type Certificate should be issued. To the contrary, 49 U.S.C. § 1423(a)(2) provides that if an aircraft design meets the FARs, the Type Certificate "shall" be issued. Congress has already made the public interest determination that Type Certificates shall be issued for aircraft that meet the FAA's

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<sup>36</sup> [Continued]

the negligence would not be that of a government employee. Gov't Brief at 37 n.36. This issue was not raised below or presented as a question in this Court. Moreover, the government admits that the evidence in this case is to the effect that the 707 was not reviewed for compliance with CAR 4b.381(d) by *anyone at all*—neither a DER nor an FAA engineer or inspector. If the review had been performed by a DER, that fact would be documented on an FAA form. (Nelson deposition at 728). No such form has ever been found (*Id.* at 731). Indeed, the certification checklist referring to CAR 4b.381(d) (J.A. 154-55) was an FAA form that should have been used by FAA employee Walter Spelman. (Curtiss deposition at 95-101). We also disagree with the government's legal conclusion that it cannot be held liable for DER negligence. The Manual of Procedure contradicts the government's argument. It states:

**TORT LIABILITY OF DESIGNATED ENGINEERING REPRESENTATIVES:**

A DER, while performing those duties which are part of his responsibilities as an agent of the Administrator, for all intents and purposes, becomes an employee of the Government and may incur liability for the United States if he is negligent. The basic standard in determining whether the United States will be responsible for his actions depends upon whether or not the individual was acting within the scope of his employment at the time of the alleged negligent act. In general, it may be said that, where the individual is furthering the interest of the Government and commits a negligent act at that time, the Government will be liable. Of course, there are limits and it should be noted that the Government will not be liable where the DER has clearly exceeded the limitations of his authority or has acted in a wanton manner and committed any one of the so-called "willful torts."

Manual of Procedure § .78.

safety regulations. No discretion is left to the FAA in that area.

Second, the testimony of the government employees in this case shows beyond any doubt that CAR 4b.381(d) is a clear and unequivocal mandatory fire protection safety regulation, that it can be applied without any subjective engineering judgments, and that the Boeing 707 waste container obviously violated the regulation. For example, the NTSB's Rudolf Kapustin testified that the noncompliance "needed no expert evaluation. It was a simple open and shut situation, that the compartment did not meet the requirements." (Kapustin deposition at 1597, J.A. 128). This was so because the waste paper compartment could not, "by any stretch of the imagination," be considered capable of containing fire. (*Id.* at 1625, J.A. 128).<sup>37</sup> Similarly, the FAA's Richard Nelson testified that in applying CAR 4b.381(d), "[t]here is no in between" because the compartment "either does or doesn't contain the fire." (Nelson deposition at 150, J.A. 130). The FAA's Rocco Lippis agreed, stating that CAR 4b.381(d) is "completely clear." (Lippis deposition at 200, J.A. 142). Thus CAR 4b.381(d) does not call for the exercise of scientific discretion, and section 2680(a) has no application.

Moreover, even if CAR 4b.381(d) did require the exercise of engineering or scientific judgment, the discretionary function exception still would not protect the government here. That exception applies only where there is room for policy judgment. *Dalehite v. United States*, *supra*, 346 U.S. at 36. It does not apply when the judgment concerns technical or scientific matters. *See, e.g., Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974); *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). CAR 4b.381(d) clearly does not call upon FAA

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<sup>37</sup> Indeed, the photographs and description of the sister ship teardown make it appear, even to a layman, as if the 707 waste paper area were designed to encourage and propagate fire, rather than contain it. *See supra*, p. 3-8.

engineers to make policy judgments, and section 2680(a) therefore does not apply.<sup>38</sup>

We turn finally to the government's "spot check" theory of aircraft certification. As noted above, this is a new argument never made in the courts below; and it cannot properly be advanced here for the first time. Beyond that, the argument is inconsistent with the facts in the record. The government relies on two FAA Handbooks, recently lodged with the Clerk of this Court, neither of which was in existence at the time the Boeing 707 was type certificated and one of which does not even deal with the type certification process. *See* FAA Handbooks 8110.4 and 8130.2B. The Manual of Procedure which was applicable to the type certification of the Boeing 707 does not support the government's argument that FAA engineers and inspectors may "spot check" the type design of a new aircraft and issue a Type Certificate even if the design does not comply with all of the applicable regulations. That Manual states that a Type Certificate will be issued only "after . . . the CAA has verified that *all* applicable airworthiness requirements are met. . . ." Manual of Procedure at 2 (emphasis added). Furthermore, although the Manual permits FAA engineers to check less than all the *data* submitted by the applicant, it gives them no discretion to review *no data at all* and issue a Type Certificate when the design fails to comply with a regulation because of that failure to review. In fact, the Manual specifically requires the FAA engineers to examine sufficient data "to ascertain that the design complies with the minimum airworthiness requirements." Manual of Procedure at 12.

The government's argument that Handbook 8110.4 permits FAA manufacturing inspectors to "spot check" air-

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<sup>38</sup> Physicians and psychiatrists routinely exercise scientific and professional judgment in treating patients. Yet this is not *policy* judgment, and it is invariably held that they do not perform a discretionary function. *See, e.g., Jablonski By Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983); *Hitchcock v. United States*, 665 F.2d 354, 362-64 (D.C. Cir. 1981); *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980); *Jackson v. Kelly*, 557 F.2d 735, 738 (10th Cir. 1977).



craft type designs and issue Type Certificates for designs that comply with less than all the regulations (Gov't Brief at 44) is supported by neither that Handbook nor the Manual of Procedure. Both documents state that: "Regardless of the manufacturer's experience, it is the FAA inspector's responsibility to assure that a complete conformity inspection has been performed by the manufacturer and that the results of this inspection are properly recorded and reported." Manual of Procedure at 11-2; FAA Handbook 8110.4 at 40. In the area of fire protection, Handbook 8110.4 explicitly directs the FAA engineers to verify compliance with *all* regulations:

103. *Fire Protection Systems.* Ascertain that *all* accessories and components comply with applicable regulations and TSO requirements (where applicable). Check suitability of equipment with respect to probable types of fires. (Class A, B, or C fires.) Check adequacy of detail installation design. Ascertain that all materials, structural and nonstructural, comply with the applicable flame-resistant requirements. Ascertain that cargo compartments are correctly classified. (Class A, B, C, D, or E.)

FAA Handbook 8110.4 at 83 (emphasis added). Mr. Nelson testified that this section of Handbook 8110.4 requires FAA engineers to check lavatory waste containers for compliance with CAR 4b.381(d) and that any deviation from the regulation would require "clearance from Washington." (Nelson deposition at 482-85).

The directive in the Manual of Procedure that FAA engineers are required to ascertain that a type design complies with *all* of the applicable regulations before a Type Certificate can issue was confirmed by the testimony of all the FAA employees deposed in the *Varig* case. Mr. Nelson testified that an aircraft design *must* comply with CAR 4b.381(d) in order to receive a Type Certificate. (Nelson deposition at 150, J.A. 131). Mr. Lippis testified that FAA regulations are "mandatory on . . . the certifying engineer" and "must be complied with." (Lippis deposition at 132-33). The FAA engineers are charged



with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81, J.A. 139-40). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*) Certainly the certification checklist used by FAA engineers (J.A. 154-55) does not suggest that they may ignore regulations at their discretion. To the contrary, it specifically requires verification of compliance with CAR 4b.381(d).

There is, in short, no evidence to support the government's "spot check" defense in the context of the initial type certification of a new commercial aircraft design.<sup>39</sup> Indeed, it is inconceivable that a low-level FAA certifying engineer could properly take it upon himself to ignore a regulation entirely and allow a complete aircraft component or system to pass without review of any sort by anyone at any time. Yet that is the gist of the government's argument here.<sup>40</sup> There is no such discretion on

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<sup>39</sup> The government also relies upon a 1980 study by the National Academy of Sciences entitled *Improving Aircraft Safety*. This study is not in the record and cannot properly be used to impeach the evidence that is in the record here. In any event, the study actually supports our position when it states (at 29) that the FAA "must be certain that the design for a new airplane meets *all* the regulatory requirements" (emphasis added).

<sup>40</sup> The reports resulting from congressional review of the FAA's type certification process show that Congress does not agree with the government's "spot check" theory of enforcement of regulations. One House subcommittee has emphasized that "the FAA must resist any . . . pressures to shortcut its procedures." Selected Review at 149. In the same report, the subcommittee criticized the FAA for failure to maintain its "traditionally . . . high degree of regulatory activity designed to require and achieve the highest degree of safety possible," and for an "erosion in the agency's traditional insistence on excellence and attention to detail." *Id.* at 195. Similarly, the House Committee on Government Operations has

[Footnote continued on page 47]

the part of the FAA engineers and inspectors, and none can be manufactured for purposes of this case.

### III. THE MISREPRESENTATION EXCEPTION DOES NOT BAR VARIG'S CLAIMS

The government raised the misrepresentation exception, 28 U.S.C. § 2680 (h), in its Petition for Certiorari before this Court issued its opinion in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). In light of the *Block* decision, we are surprised that the government persists in its misrepresentation argument.<sup>41</sup> *Block* is on all fours with the present case, and it compels affirmance of the court of appeals' holding that VARIG's claims are not barred by the misrepresentation exception.

In *Block v. Neal*, the plaintiff alleged that the Farmers Home Administration ("FmHA") had negligently inspected and supervised construction of her house. The house was being constructed for the plaintiff by a builder named Home Marketing Associates, Inc. FmHA inspected the construction work on three occasions and ultimately issued a final report stating that the construction was in accord with all the applicable drawings and specifications, which had been previously approved by FmHA. After the

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#### <sup>40</sup> [Continued]

declared that "[t]he highest possible level of safety certainly cannot be achieved with even slightly defective aircraft." Critique at 6. With respect to the FAA's regulation concerning lavatory sink units in particular, it is interesting that the current FAA Administrator testifying recently before Congress in connection with a recent in-flight aircraft fire argued that smoke detectors in lavatories are not necessary because waste receptacles "are designed so if there is a fire in there . . . they will burn themselves out and be contained." *Aircraft Maintenance and Fire: Hearing Before the Subcomm. on Transportation, Aviation, and Materials of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 54 (1983).

<sup>41</sup> It is ironic that in its Petition for Certiorari, filed while *Block v. Neal* was under submission, the government asserted that *Block* would "have a substantial bearing on the applicability of the misrepresentation exception to this suit." Petition for Certiorari in No. 82-1350, at 22. Now that the government has seen the opinion in *Block*, it attempts to distinguish the case.

plaintiff moved into her house, she discovered a faulty heat pump and thirteen other construction defects. Some of the defects constituted deviations from the approved drawings and specifications. The plaintiff was unable to obtain satisfaction from Home Marketing and thereafter brought a Tort Claims Act case against the United States.

The Sixth Circuit held that the plaintiff's claim was not barred by the misrepresentation exception, and this Court agreed. Distinguishing *United States v. Neustadt*, 366 U.S. 696 (1961), the Court held that the plaintiff's claim was based primarily on FmHA's negligent inspection and supervision of construction of the house and not on the misstatements that may incidentally have appeared in FmHA's final report. In *Neustadt*, the plaintiff simply paid too much for a house in reliance on an erroneous government appraisal; he alleged "no injury that he would have suffered independently of his reliance on the erroneous appraisal." 103 S. Ct. at 1093. In *Block*, by contrast, the plaintiff did suffer such an independent injury. Regardless of FmHA's final report, the plaintiff would have been injured by the defects in her house that should have been prevented by the government's inspection. As the Court explained:

Neal's factual allegations would be consistent with proof at trial that Home Marketing would never have turned the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

103 S. Ct. at 1094.

In addition, the Court pointed out that the misrepresentation exception generally applies only to invasions of financial or commercial interests in the course of business dealings, not to the sort of property damage claims exemplified by the *Indian Towing* case. See 103 S. Ct. at 1093 n.5.

The present case falls squarely within the rationale of *Block v. Neal*, and the misrepresentation exception is therefore inapplicable.<sup>42</sup> VARIG's claim is not based upon FAA misstatements contained in the Boeing 707 Type Certificate or anywhere else. VARIG alleges, rather, that the FAA was negligent in reviewing and inspecting the design of the Boeing 707 and negligent in failing to require Boeing to comply with the applicable safety regulations, such as CAR 4b.381(d). See VARIG's First Amended Complaint ¶¶ 7, 13 (J.A. 18, 20). If the FAA had not been negligent, it would have required Boeing to comply with CAR 4b.381(d) and would not have permitted the 707 to operate in its defective condition. VARIG suffered property damage that is wholly independent of the misstatements made by the FAA in the Type Certificate. Its 707 aircraft was destroyed as a result of defects that should have been discovered and corrected by the FAA. Moreover, we are dealing here with property damage like that in *Indian Towing*, not the invasion of financial or commercial interests in the course of business dealings.

Thus, the parallel between this case and *Block v. Neal* is complete; this case cannot be reversed without overruling *Block v. Neal*. The government makes a half-hearted attempt to avoid *Block* by suggesting that FmHA's undertaking to supervise construction of the plaintiff's house was the key distinguishing factor in that case. Gov't Brief at 49.<sup>43</sup> Yet in *Block*, the plaintiff alleged that FmHA was negligent in both inspecting and supervising construction of the house. See 103 S. Ct. at 1090. There is no indication from the Court's opinion

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<sup>42</sup> For a recent application of *Block v. Neal* consistent with our views, see *Cross Bros. Meat Packers, Inc. v. United States*, 705 F.2d 682 (3d Cir. 1983).

<sup>43</sup> The government also cites Illustration 8 of § 311 of the *Restatement (Second) of Torts*. Gov't Brief at 47-48. This is the same Illustration that it cited—unsuccessfully—in *Block v. Neal*. Brief for the United States in *Block v. Neal*, at 17 & n.8 (August 1982). The Illustration is no more persuasive here than it was in *Block*.

that supervision of construction was the decisive factor. In addition, the FmHA in *Block* did no more to "super-vise" construction of the plaintiff's house than the FAA did to "supervise" design of the 707. In both cases, the government inspected a private party's product to ensure that it was properly produced in accordance with approved plans and specifications. Again, the parallel with *Block* is complete; and there is no principled basis for departing now from the *Block* decision.

Finally, the government makes the curious contention that under *Block* only Boeing—not VARIG—should be permitted to recover for the FAA's negligence in certifying the 707. Gov't Brief at 50. This argument really seems more appropriate for the opening section of the government's brief; it has little to do with the misrepresentation exception. In any event, the government again ignores the actual facts of *Block*. The government in *Block* inspected the manufacturer's product, and the unrelated customer was permitted to recover. The result is the same here. The FAA negligently inspected the manufacturer's product (the Boeing 707), and the customer (VARIG) is entitled to recover. Once more, *Block v. Neal* requires affirmance of this case.

### CONCLUSION

For all the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Nos. 82-1349 and 82-1350

Supreme Court, U.S.  
FILED

JAN 24 1984

ALEXANDER L. STEVAS  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,  
v. *Petitioner,*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE,  
*Respondent.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

EMMA ROSA MASCHER, *et al.,*  
*Respondents.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

UNITED SCOTTISH INSURANCE Co., *et al.,*  
*Respondents.*

On Writs of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**SUPPLEMENTAL BRIEF FOR RESPONDENT  
VARIG AIRLINES**

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January 24, 1984



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IN THE  
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OCTOBER TERM, 1983

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S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE,  
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UNITED STATES OF AMERICA,  
v. *Petitioner,*

EMMA ROSA MASCHER, *et al.*,  
*Respondents.*

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No. 82-1350

UNITED STATES OF AMERICA,  
v. *Petitioner,*

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*Respondents.*

---

On Writs of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**SUPPLEMENTAL BRIEF FOR RESPONDENT  
VARIG AIRLINES**

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Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in response to questions from the Court during oral argument to which counsel for United Scottish Insurance Co., *et al.* ("UNITED SCOTTISH"), Mr. Rich-

ard F. Gerry, gave answers not in accord with VARIG's position. Following is VARIG's position on each of the issues raised.<sup>1</sup>

## ARGUMENT

### 1. Negligence of the FAA and the VARIG Crash

During oral argument the following exchange occurred between the Court and Mr. Gerry concerning the time span between the negligence of the Federal Aviation Administration ("FAA") and the VARIG crash, and whether there was a repetition of the FAA's negligence, first committed during the type certification process, at the time the Airworthiness Certificate was issued:

QUESTION: In the Scottish case that you are just referring to, what was the time span between the FAA inspection and the accident?

MR. GERRY: About two and a half years, from 1965 to 1968.

QUESTION: The Scottish case?

MR. GERRY: In the Scottish case.

QUESTION: I thought that was the time on the other case.

MR. GERRY: No, the other case was from 1958 at the time of the issuance of the original type certificate for the Boeing 707 and 1968, the time of the—1973, the time of the accident, 15 years in that case.

QUESTION: When do you think the negligence occurred in the Varig case?

MR. GERRY: In the Varig case, in the original type certification, Your Honor—

QUESTION: There was not a repetition of that negligence when the plane was given an Airworthiness Certificate?

MR. GERRY: Your Honor—

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<sup>1</sup> VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

QUESTION: I just want yes or no.

MR. GERRY: No is the answer.

Transcript of Proceedings before the Supreme Court (January 18, 1984), at 26-27.

Both of Mr. Gerry's answers are incorrect. As pointed out in Brief for Respondent Varig Airlines, at 10 n.10, the Type Certificate for the Boeing 707-300C series, the model aircraft involved in the VARIG crash, was issued on April 30, 1963. The Airworthiness Certificate for the accident aircraft was issued in 1968 (Joint Appendix ("J.A.") 60). It is VARIG's view that the FAA was negligent in 1958 when it issued a Type Certificate for the first 707 model. There was a repetition of that negligence in 1963 when the FAA issued a Type Certificate for the 707-300C series, and again in 1968 when it issued an Airworthiness Certificate for the accident aircraft. Thus, the time span between the FAA's negligence and the VARIG crash was five years (1968-1973), not fifteen.

## 2. Inspection of VARIG's 707 in Brazil

Mr. Gerry made the following misstatement regarding whether VARIG's 707 was subject to inspection in Brazil:

QUESTION: Were these aircraft subject to inspection in the countries to which the airline's purchaser is attached?

MR. GERRY: Yes, they were, Your Honor. . . .

Tr. at 26. This is incorrect. As stated in the uncontradicted affidavit of Frederico J. Ritter, when VARIG buys an aircraft manufactured in the United States such as the Boeing 707 accident aircraft which has been issued both a Type Certificate and an Airworthiness Certificate by the United States FAA, "the airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with

regulations. *Neither does the Brazilian government when the aircraft is registered in Brasil.*" (Ritter Affidavit ¶ 3, J.A. 150) (emphasis added).

### 3. Delegation of Inspections by the FAA

VARIG disagrees with the following account given by Mr. Gerry with respect to the delegation of inspection activities to Designated Engineering Representatives ("DERs") employed by the manufacturer in the type certification of the Boeing 707:

QUESTION: Do you know whether or not the FAA ever delegates to the manufacturer the issuance of the type certificate?

....

MR. GERRY: They delegate some inspection activities to designated representatives. . . .

....

. . . At the time of the Varig aircraft certification there was not this delegation option. . . .

Tr. at 28-29.

Mr. Gerry's statement is incorrect. According to the deposition testimony of the FAA's employees (J.A. 137), the DER system was in existence at the time of the type certification of the Boeing 707 and DERs were used during that type certification process.

However, as pointed out in VARIG's Brief, at 36, *FAA employees* were required to verify that the manufacturer had complied with all of the applicable federal aviation regulations before issuing a Type Certificate. In the *Varig* case, the evidence is to the effect that neither the FAA nor anyone else *ever* inspected or viewed the design of the Boeing 707 lavatory trash container to verify compliance with CAR 4b.381(d), despite the fact that FAA employees had *no* discretion to "spot check" compliance with only *some* of the regulations. (See VARIG Brief at 15-16).

#### 4. Discretionary Function and the *Dalehite* Case

During counsel for UNITED SCOTTISH's argument on the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), the Court asked him whether the Court in *Dalehite v. United States*, 346 U.S. 15 (1953), had not found that "the decision as to how to bag fertilizer was discretionary." Tr. at 33. Mr. Gerry disagreed, and stated that "we are a long way from *Dalehite*." *Id.*

It is VARIG's position that the Ninth Circuit's ruling in *Varig* is consistent with *Dalehite* on this point. As the Court correctly noted, in *Dalehite* the Court did find that the government's decision on how to bag fertilizer came within the discretionary function exception to the Act. However, this finding turned upon the fact that the decision on how to bag the fertilizer, as well as other decisions in the manufacturing process held to be negligent by the district court, "were all responsibly made at a planning rather than operational level. . . ." 346 U.S. at 42. The Court found:

*Each [of the acts] was in accordance with and done under, specifications and directions as to how the FGAN was produced at the plants. The basic 'Plan' was drafted by the office of the Field Director of Ammunition Plants in June, 1946, prior to beginning production . . . .*

. . . Each of these acts looked upon as negligence was directed by this plan . . . . Bagging temperature was fixed. The type of bagging and the labeling thereof were also established. The PRP coating, too, was included in the specifications. The acts found to have been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.

*Id.* at 38-40 (emphasis added, footnotes omitted). *Dalehite* thus established that under the discretionary func-

tion exception "acts of subordinates in carrying out the operations of government *in accordance with official directions* cannot be actionable. *Id.* at 36 (emphasis added).

In the *Varig* case, the decision that the aircraft lavatory trash container should contain fire, as stated in CAR 4b.381(d), was no doubt made at the planning and policy level. Here, however, the analogy with *Dalehite* ends. In contrast to the government employees in *Dalehite*, the evidence is that *no* FAA employee *ever* inspected the lavatory to verify that it complied with the regulation. The responsible FAA employees simply failed to carry out a specific, mandatory regulation which they were supposed to enforce. The discretionary function exception to the Federal Tort Claims Act does not encompass the *failure* to carry out official directions as embodied in specific, mandatory agency regulations; and this Court's decision in *Dalehite* does not support such an interpretation. See VARIG Brief at 38-41.

### CONCLUSION

For all of the reasons stated above, as well as the reasons stated in VARIG's brief on the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 24, 1984



No. 82-1349

Office - Supreme Court, U.S.

FILED

OCT 28 1983

ALEXANDER L. STEVAS,  
CLERK

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EMMA ROSA MASCHER, *et al.*

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BRIEF OF RESPONDENTS  
EMMA ROSA MASCHER, *ET AL.*

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### QUESTIONS PRESENTED

1. Whether the United States is liable for the negligence of its employees in the conduct of inspections of aircraft mandated by Federal law and regulations and relied upon by the public?

2. Whether the negligent failure of a Federal Aviation Administration ("FAA") engineer, in the course of an inspection of an aircraft lavatory trash container to determine if the container, which had no lid, was therefore incapable of containing a fire, involves the sort of discretionary judgment which is not actionable by reason of 28 U.S.C. 2680(a), the "discretionary function" exception?

3. Whether negligence in the inspection of an aircraft, as a result of which an obvious and dangerous defect is either created or overlooked, constitutes a "misrepresentation" which is not actionable by reason of 28 U.S.C. 2680(h), the "misrepresentation" exception?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 82-1349

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UNITED STATES OF AMERICA, *Petitioner*,

v.

EMMA ROSA MASCHER, *et al.*

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On Writ Of *Certiorari* To The United States  
Court Of Appeals For The Ninth Circuit

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**BRIEF OF RESPONDENTS**  
**EMMA ROSA MASCHER, ET AL.**

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**STATEMENT**

**1. The Accident And Investigation**

On the morning of July 1, 1973, a Boeing 707-300 aircraft operated by Varig Airlines was cleared to descend from its cruising altitude as it approached the Orly Airport, Paris, France. The aircraft was fully loaded, and after an 11½ hour transatlantic flight from Brazil, passengers were moving about the cabin making preparations for the final landing at their destination. As the aircraft descended below 10,000 feet, one of the passengers advised a steward of the sudden appearance of a large volume of white smoke in one of the aft lavatories. In the next few minutes, the smoke turned from white to black, totally filled the passenger compartment, invaded the



flight deck forcing the crew to don oxygen masks, and so obscured their vision that they could not see the instruments located but a few feet in front of them. In an attempt to remove the smoke and save the passengers' lives, they depressurized the aircraft, but to no avail. Recognizing that all aboard would die unless the aircraft could be landed, they opened the sliding windows on either side of the cockpit in order to see the ground and accomplished a forced landing in a farmer's field.

Though the landing was successful, the evacuation was not. All passengers save one and many of the extra crew members required to be on board because of the exceptional length of the flight died while strapped in their seats by reason of inhalation of the hydrogen cyanide, hydrogen fluoride and carbon monoxide produced by the burning plastic material in the interior of the aircraft.<sup>1</sup>

The French Government issued a report<sup>2</sup> in which it found that the fire probably started in a trash container under the sink in the starboard lavatory which was probably full of paper after the long trip.<sup>3</sup> The French officials also concluded that the trash containers themselves were probably not in compliance with the U.S. regulations under which the aircraft had been built in that they did not contain the fire.<sup>4</sup>

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<sup>1</sup> Passenger oxygen masks, unlike those of the crew, are ineffective in the case of smoke and toxic gas, since they do nothing more than mix pure oxygen with ambient cabin air. *J.A.* 95.

<sup>2</sup> *J.A.* 49.

<sup>3</sup> *J.A.* 98.

<sup>4</sup> *J.A.* 97. CAR 4b 381(d) states in pertinent part: "All recepticals [sic] for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

## 2. Proceedings Below

Suit on behalf of survivors of sixty-two deceased passengers against the United States was instituted in the Central District of California.<sup>5</sup>

Following limited discovery and depositions of some government employees, the District Judge granted summary judgment under Rule 56, F.R.C.P. and found, as a matter of fact, that: "the inspection of aircraft accomplished by the FAA is a regulatory function not an operational service like air traffic control."<sup>6</sup>

Significantly, the District Court expressly declined to find, as a matter of fact, that:

- a) The . . . inspection and certification of the Boeing 707 did not increase the risk of harm to the plaintiffs (passengers).
- b) The . . . inspection and certification of the Boeing 707 did not induce reliance by the plaintiffs (passengers).<sup>7</sup>

Based upon these and other findings of fact, the District Court concluded, *inter alia*, as a matter of law, that:

- a) The law of California applies to this action.
- b) The Government is liable under the Tort Claims Act only to the extent a private person under like circumstances would be liable.

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<sup>5</sup> 28 U.S.C. 1402(b) provides that suit against the United States may be instituted only in the District Court where the plaintiffs reside or where the act or omission occurred. Plaintiffs alleged that the negligence of the Federal Aviation Administration (FAA) occurred in the Western Region of the FAA, headquartered in Los Angeles, California.

<sup>6</sup> Finding of Fact ¶ 11 (E.R. 44).

<sup>7</sup> Proposed Finding of Fact ¶¶ 13, 14 (E.R. 44).

- c) California law does not recognize a cause of action on the part of a private individual, for negligence in inspection and certification activities.
- d) The Government had no legal duty to the passengers by reason of the promulgation of safety standards, by its undertaking to promote air safety, or by reason of the Federal Aviation Act of 1958.
- e) No duty arises under the California Good Samaritan doctrine.
- f) Any valid claims of the passengers against the Government were barred by the discretionary function exception<sup>8</sup> or the misrepresentation exception<sup>9</sup>, or both.<sup>10</sup>

On appeal, the Ninth Circuit reversed.<sup>11</sup> It agreed that these actions were governed by the law of California. But it disagreed with the District Judge in every other material respect. The Court held that under the California Good Samaritan doctrine, the Government would be liable in the performance of an inspection of an aircraft, just as would a private individual, if the Government, by reason of an act or omission committed in the course of the inspection either (a) increased the risk of harm to third parties (*i.e.* the passengers) or (b) caused those third parties to rely on proper performance of the inspection.<sup>12</sup> Such inspections, mandated as they are by Federal law and regulations, are a service which the FAA has

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<sup>8</sup> 28 U.S.C. 2680(a).

<sup>9</sup> 28 U.S.C. 2680(h).

<sup>10</sup> Petition for Writ of Certiorari, Appendix B at 10a-12a.

<sup>11</sup> *S.A. Empresa de Viacao Aerea Rio Grandense, et al. v. United States*, 692 F.2d 1205 (9th Cir. 1982) (hereinafter "*Varig v. USA*").

<sup>12</sup> *Id.*

voluntarily undertaken to perform for the flying public, and not a regulatory activity exempt from liability. Indeed, "[e]ven without reference to the Good Samaritan Rule . . . an action against the government will lie in a negligent inspection and certification case."<sup>13</sup>

Finally the Court of Appeals concluded that neither the misrepresentation exception nor the discretionary function exception would bar these actions.

### SUMMARY OF THE ARGUMENT

Inspections of aircraft are conducted at many levels, beginning with the inspections of the design drawings and the prototype of each model aircraft, as described by the Petitioner.<sup>14</sup> Individual production aircraft of the transport category are checked again as they leave the factory to determine that they match the previously approved prototype. Finally, once the aircraft is in operation, the inspection process continues. Transport category aircraft are inspected by their operators before each flight, and periodically are subjected to overhauls in the field. Each inspection is accomplished on the presumption that the underlying and preceding inspections have been accomplished. Each is as much a necessary part of each operational flight as every other.

The inspection of design drawings and the prototype aircraft to determine whether trash containers were constructed of fire resistant material and in such a manner as to contain any possible fire<sup>15</sup> was thus both necessary and

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<sup>13</sup> *Id.* at 1208, citing, *Arney v. United States*, 479 F.2d 653, 661 (9th Cir. 1973).

<sup>14</sup> Petitioner's Brief at 4-9.

<sup>15</sup> CAR 4b 381 (d), *supra* note 4.

operational. Passengers rely on the Government to conduct such inspections in part because of the wide publicity given this effort by the media and the FAA itself.<sup>16</sup> Such inspections hardly involve the kind of administrative use of discretion which would place the act within the protective perimeter of the discretionary function exception.<sup>17</sup> Nor, for that matter, is the misrepresentation exception of any greater applicability since here the gravamen of the action is negligence in the inspection itself,<sup>18</sup> not the negligent misrepresentation of the condition of the aircraft conveyed by any certificate issued as a result of it.<sup>19</sup>

## ARGUMENT

### 1. Inspections By Government Engineers Are Operational

The Government asserts that the "private person" limitation<sup>20</sup> of the Tort Claims Act was intended not only to "adopt state law as the rule of decision for imposing tort liability, but also to *preserve inviolate from tort suits a core of governmental activities that are never engaged in by private citizens.*"<sup>21</sup>

By this the Government has reduced itself to the argument that inspections accomplished in the course of certifying a transport category aircraft as having been designed and built in accordance with its own standards are "uniquely governmental" so as to raise them to the level of regulatory activities which are immune from suit.

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<sup>16</sup> J.A. at 99-100.

<sup>17</sup> *Dalehite v. United States*, 346 U.S. 15 (1953).

<sup>18</sup> *Block v. Neal*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 1089 (1983).

<sup>19</sup> *United States v. Neustadt*, 366 U.S. 696 (1961).

<sup>20</sup> 28 U.S.C. §§ 1346(b) and 2674.

<sup>21</sup> Petitioner's Brief at 23 (emphasis added).

By this type of reasoning the Government hopes to plaster the label of regulatory activity all over the acts complained of, thus diverting this Court's attention from their true nature.

In so doing, the Government seeks to move the field of battle away from the inspections which it negligently performed to the certificates which it negligently issued. It does so for three reasons. First, it seems obvious that inspections are conducted every day by private persons, whereas the certification of aircraft sounds a great deal more like the sort of "core of governmental activities" which the Congress supposedly sought to immunize through the use of the "private person" limitation.<sup>22</sup> Second, if it can be successfully argued that the deceased passengers really relied to their detriment on the certificate rather than the inspection which preceded it, then the misrepresentation exception might be raised to bar the suits.<sup>23</sup> Last, if the facts can be equated to regulatory activity in other areas, then the predictable "parade of horrors" becomes a more persuasive argument.<sup>24</sup>

The facts of the case are such, however, that they cannot be easily mislabeled. The Government explains at length the scheme by which inspections and certifications of transport category aircraft are made and emphasizes that "the vast majority of the FAA's inspections are performed by 'designated engineering representatives' "

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<sup>22</sup> Ignoring, for the moment that under California law a duty exists to conduct such inspection with due care. *Hanberry v. Hearst Corp.*, 276 Cal. App.2d 680, 683, 81 Cal. Rptr. 519, 521 (Ct. App. 1969).

<sup>23</sup> *United States v. Neustadt*, *supra* note 19; *Marival, Inc. v. Planes, Inc.*, 306 F.Supp. 855 (N.D. Ga. 1969).

<sup>24</sup> Petitioner's Brief at 26-27.

who are *usually* employees of the manufacturer carrying special FAA designation.<sup>25</sup>

In the instant case, however, the record shows that the offending inspection was done by FAA employees, and the lavatory waste receptacle design which they supposedly inspected could not conceivably have met the minimum standards required by the regulations. Examination of a sister ship in Rio de Janeiro, Brazil, after the accident, revealed that the trash "container" under the sink in the lavatory was in reality no container at all. Paper towels stuffed into the flapper door at one side of the sink module simply fell down into the area directly below the sink. This volume of space also contained the electric water heaters and a source of air. Not only was there no container, as such, but the module walls themselves were penetrated in several spots by large round holes, the purpose of which was never established and the presence of which simply assured that any fire developing below the sink would have an adequate supply of oxygen and immediate access to the plastics on the inside of the aircraft pressure hull.

In fact, even the FAA engineer detailed to investigate the accident stated in a report addressed to his seniors:

It was also observed in the waste container area of most lavatories that there were numerous holes through the vertical panels between compartments leading to other compartments and in some cases to the aircraft skin. This created an interesting revelation and *it was not clear how the waste containers could possibly contain fire*, as required by CAR 4b 381(d) and FAR 25.853(d).<sup>26</sup>

That same engineer drafted a proposed Airworthiness Directive in which he made the determination that "most

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<sup>25</sup> *Id.* at 8.

<sup>26</sup> 1 Nelson Deposition at 17, Exhibit 26 (emphasis added).



containers in all [jet transports] must be modified to provide simple and obvious containment".<sup>27</sup> In his opinion, the aircraft would not have been certified "if it had not been approved-reviewed" by FAA inspectors.<sup>28</sup> "(FAA) Manufacturing inspectors should be alert for any detail design feature which does not appear to comply with pertinent regulations."<sup>29</sup>

A letter dated March 20, 1967, from Boeing to the Director, Western Region, FAA, states, with respect to inspection of the interior of Boeing 707 aircraft by FAA engineer Bulmer: "There were numerous items found during the inspection which were considered unacceptable by Mr. Bulmer *and were modified to his satisfaction prior to delivery of the airplane.*"<sup>30</sup>

Depositions of that person revealed that he knew the reason his position or job existed was to promote air safety.<sup>31</sup> He further knew that the beneficiaries of his work were the flying public and the operators of the airplanes.<sup>32</sup> He also knew the flying public depended on him to do his job in the interests of air safety.<sup>33</sup>

Thus, the situation is exactly parallel to that which exists whenever a private person possessing special knowledge, credentials and opportunity voluntarily undertakes to inspect, and others, not having either the

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<sup>27</sup> 2 Nelson Deposition at 356-357.

<sup>28</sup> *Id.* at 442.

<sup>29</sup> 1 Nelson Deposition at 39, Exhibit 34.

<sup>30</sup> Curtis Deposition at 151 (emphasis added).

<sup>31</sup> Bulmer Deposition at 89-90.

<sup>32</sup> *Id.* at 90.

<sup>33</sup> *Id.*

expertise or the opportunity, rely on the fact of such inspections to their detriment. Passengers know the government inspects, and have reasonably come to believe that the American-built aircraft in which they fly are safe for that reason. Such inspections may be conducted in the course of an effort to enforce the minimum standards of the regulations, but as such, they are no different than any other governmental activity.<sup>34</sup> The question is whether the conduct complained of, if accomplished by a private person, would subject the government to liability in accordance with the law of the place where the act or omission occurred.<sup>35</sup>

## 2. The Voluntary Nature Of The Governmental Undertaking

A voluntary undertaking by the Government to invade every facet of the aviation industry is apparent throughout the statutory scheme.

Congress was under no duty to pass the Federal Aviation Act of 1958, requiring the Administrator to certify (but not to inspect) all transport category aircraft. But Congress did, and in doing so recognized that the flying public, by reason of past practices and existing legislation, would rely on the Government for "maintenance of the safety vigilance that has evolved within air transportation and air commerce and *has come to be expected by the travelling . . . public.*"<sup>36</sup>

Though not required by statute, the FAA voluntarily and unilaterally decided that inspections were to be part

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<sup>34</sup> Air traffic controllers, whose activity is classically "operational" are simply enforcing the Federal Aviation Regulations.

<sup>35</sup> 28 U.S.C. § 1346(b); *Hanberry v. Hearst Corp.*, *supra* note 22.

<sup>36</sup> 49 U.S.C. § 1302(a)(2) (Supp. IV 1980) (emphasis added).

of the method by which the requirements of the law should be met. Neither the Civil Aeronautics Act of 1938 (hereinafter the "Act of 1938") nor the Federal Aviation act of 1958 (hereinafter the "Act of 1958") required the Administrator to inspect the design of transport category aircraft for compliance with the regulations. Section 603(a) of the Act of 1938, and its companion section of the Act of 1958 simply state:

The Administrator shall make, or require the applicant to make such tests during manufacture and upon completion as the Administrator deems reasonably necessary *in the interests of safety*. . . . If the Administrator finds that such aircraft . . . is of proper design, material, specification, construction and performance *for safe operation* and meets the minimum standards, rules and regulations . . . he shall issue a type certificate.<sup>37</sup>

By regulation, however, the Administrator chose to inspect transport category aircraft (as opposed to light aircraft) for compliance.<sup>38</sup>

Thus, the Agency did not inspect because it was required to do so by a contract, or pursuant to an enforcement scheme. Rather it volunteered to inspect in order to protect the flying public, and then publicized its undertaking in the *Code of Federal Regulations*.

The former chief of the Aircraft Engineering Division of the Western Region of the FAA and present Director, Office of Airworthiness, testified in this case that two different inspection and certification systems are in effect, one available only to manufacturers of general (light)

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<sup>37</sup> 49 U.S.C. § 1423(a)(2) (1970) (emphasis added).

<sup>38</sup> CAR 4b; FAR Part 25; Beard Deposition at 14, 38, 109-111.

aviation aircraft and the other to manufacturers of transport category aircraft. In the former category inspections are conducted by the Designated Engineering Representatives; in the latter mostly by FAA engineers.<sup>39</sup>

He also testified that an airworthiness certificate signifies to the public and the manufacturer that a particular airplane conforms to an approved design and is in condition for safe flight.<sup>40</sup> Likewise, type certificates are given immediate publicity by the manufacturer "because they were so proud they could get the certificate and it helped them in their marketing".<sup>41</sup> A statement is also published in the Federal Register "to advise the world that we have issued a type certificate".<sup>42</sup>

Various inspections are conducted by the FAA, including compliance inspections, conformity inspections, production system inspections and aircraft inspections.<sup>43</sup> The purpose of all inspections is air safety, and the intended beneficiaries are the passengers and the operators of the airplanes.<sup>44</sup>

The factual picture which thus emerges is quite different from that which appears from a reading of Petitioner's brief. The substance of it is this: That the Congress gave the Administrator of the FAA the authority and responsibility to approve aircraft designs, prototypes and production models. The FAA, through regulations, then

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<sup>39</sup> Beard Deposition at 14, 38, 109.

<sup>40</sup> *Id.* at 48.

<sup>41</sup> *Id.* at 50-51.

<sup>42</sup> *Id.* at 52.

<sup>43</sup> *Id.* at 113.

<sup>44</sup> *Id.* at 114-115.

voluntarily undertook to do so in two different ways; one with respect to private or "general aviation" aircraft and another with respect to aircraft intended for the carriage of passengers for hire. In the latter category much more stringent inspections were made far more often by many more FAA engineers. This fact received wide publicity and many members of the flying public, including some if not all of the passengers aboard the ill-fated flights, relied to some greater or lesser extent on these engineers to do exactly what the FAA said they would do—inspect for compliance with the minimum standards predicated by the regulations.

Having voluntarily undertaken this line of conduct, with full knowledge that the public would come to rely on it, the Government should be held liable for the negligence of its engineers in the conduct of such inspections.<sup>45</sup>

### 3. Publicity Given To The Voluntary Undertaking

Aside from the widespread notoriety which necessarily follows the passage of a public law<sup>46</sup> and the somewhat less effective, but legally efficient, publication in the Federal Register, the FAA has tooted its own horn repeatedly, and even the most atonal listener will hear quite a different tune than that sung by the Government in its brief.

The Pilot's Handbook of Aeronautical Knowledge, an FAA Advisory Circular used as a basic instructional

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<sup>45</sup> *Coffee v. McDonnell Douglas Corp.*, 8 Cal. 3d 551, 503 P.2d 1366 (1972); *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App.2d 69, 70 Cal. Rptr. 136 (1968); *Schwartz v. Helms Bakery Ltd.*, 60 Cal. Rptr. 510, 430 P.2d 68 (1967); *Weirum v. RKO General Inc.*, 123 Cal. Rptr. 468, 539 P.2d 36 (1975); *Roberts v. Ball, Hunt, Brown & Baerwitz*, 57 Cal. App.3d 104, 128 Cal. Rptr. 901 (1976).

<sup>46</sup> 49 U.S.C. 1302(a)(2).

manual for members of the public interested in aviation, and a primer for all interested in aviation, has this to say with respect to the inspection and certification process:

One of the most important activities in promoting safety in aviation is the airworthiness certification of airplanes. Each airplane certificated by the Federal Aviation Administration has been manufactured under rigid specifications of design, materials, workmanship, construction, and performance. *This certification process provides adequate assurance that the airplane will not fail from a structural standpoint if the airplane is properly maintained and flown within the limitations clearly specified.*<sup>47</sup>

Even more to the point is this language from an official FAA article authored and published by the FAA entitled: *The FAA Stamp of Approval: How the Agency Ensures Safe Aircraft.*

When the Boeing 767 goes into airline service late in 1982, it will carry with it what amounts to a *warranty from the Federal Aviation Administration that the aircraft is as safe as man and the state-of-the-art can make it.*

*That warranty, which will be over and above any warranty offered by the manufacturer, will be embodied in the Type Certificate the FAA will have to issue before the aircraft can go into passenger service.*

The Type Certificate will serve notice that the 767—a quiet and fuel-efficient twin-engine, wide-body airplane that will be the first of the fourth generation of jet transports—meets all of the FAA's standards for safety and reliability.

It will be issued only after the most thorough testing and evaluation program a new type of aircraft

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<sup>47</sup> FAA Advisory Circular 61-23A, at 33 (1971) (emphasis added).

has ever undergone, a job to which the FAA will devote up to 50,000 hours of work.<sup>48</sup>

Such pronouncements made repeatedly over the years have created, in the public mind, an image of FAA activity and a reliance on FAA efficiency which is to be expected under the circumstances.

As stated by a brother of Elio Rosa, an American chemical engineer who died on the fatal flight, the deceased had "complete faith in the American planes he flew" and "would never fly on foreign built aircraft . . . because he doubted that the foreign planes had the same rigid government inspections. . . ."<sup>49</sup> From this, one must conclude that Rosa, and other passengers, had developed a reliance that Government inspectors would do their duty with reasonable care—the same sort of reliance which the Congress foresaw when it amended the Act of 1958<sup>50</sup> and which was recognized by Jack Bulmer, whose duty it was to inspect, and by Craig Beard, whose duty it was to supervise.<sup>51</sup> The lips of all the passengers have been forever sealed by the very negligence which the FAA now seeks to avoid, and as a result, it may be difficult, if not impossible for this additional reason, to obtain evidence of the specific reliance on the part of each one. Nevertheless, the passengers contend that the continuing and well publicized nature of the tests and inspections of the FAA have reinforced just what Congress said they had already accomplished in 1980, *i.e.* to create an

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<sup>48</sup> Farrar, *The FAA Stamp of Approval: How the Agency Ensures Safe Aircraft*, FAA World, Vol. 11, No. 1, January 1981, at 5.

<sup>49</sup> J.A. at 99-100.

<sup>50</sup> 49 U.S.C. 1302(a)(2).

<sup>51</sup> Bulmer Deposition at 90; Beard Deposition at 114-115.



expectation amongst the travelling public that the FAA will maintain the safety standards which have evolved in commercial air transportation.<sup>52</sup>

For instance, the spectacular crash of an American Airlines DC-10 in Chicago in May of 1979 focused the interest of the entire nation on the certification process, and brought about the creation of a "blue ribbon panel" of experts to examine the manner in which it works. A report was produced by the panel<sup>53</sup> in which the conclusion, with respect to the certification system, was that "the worldwide acceptance of U.S. built airplanes, confirm that *our nation's system for assurance of airworthiness operates quite well.*"<sup>54</sup>

Hearings held by the panel confirm the fact that representatives of industry, the FAA and the public share the same perception regarding the true role of the FAA in the inspection and certification process.

The same Craig Beard, Director of Airworthiness for the FAA, told the panel that he would provide them with a briefing on the statutes and regulations, in the course of which he would describe "*the procedures through which we assure airworthiness.*"<sup>55</sup>

Though careful to point out that "those that conceive [the airplane], make it, operate it and handle it are those

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<sup>52</sup> 49 U.S.C. 1302(a)(2) (& Supp. IV 1980).

<sup>53</sup> See Petitioner's Brief at 5-6, and reference to the "NAS Report."

<sup>54</sup> Committee on FAA Airworthiness Certification Procedures, National Research Council, National Academy of Sciences, *Improving Aircraft Safety*, (hereinafter "NAS Report"), Letter of Transmittal by Philip Handler, Chairman, National Research Council, June 24, 1980, at 2 (emphasis added). A copy of the report has been lodged with the clerk.

<sup>55</sup> NAS Hearings at 26, January 21, 1980 (emphasis added).

who do have the greatest opportunity to affect its airworthiness,"<sup>56</sup> he admitted that "the FAA plays an important role in assuring the public and the people who work with the aircraft of their safety."<sup>57</sup>

As to the role of the Designated Engineering Representatives, the importance of which is so emphasized by the Petitioner,<sup>58</sup> he testified:

[T]he [Federal Aviation] Act permits us to delegate functions. It does not permit us to delegate our responsibilities. So, when we designate a function to a designated engineering representative *we still consider ourselves responsible for the actions of the person*, and when he represents the Administration *it is an act of the FAA*.<sup>59</sup>

This is a view widely held throughout industry. In the same hearings, Mr. Richard Taylor, Vice President and Special Assistant to the President of Boeing, was asked this question and gave this answer:

Q. Is it your impression that the people from the insurance industry in the world market . . . accept the FAA certificate or whatever country's certificate, that they accept Boeing, Lockheed and Douglas; they accept all this as the good housekeeping seal; they don't have their own labs for testing? . . . [T]he FAA is the underwriters lab for aircraft? Is that your impression?

A. If I understand your question I think it is yes.<sup>60</sup>

This perception of a shared duty is also held by the airlines who operate the aircraft. At the same hearings Mr.

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<sup>56</sup> *Id.* at 28.

<sup>57</sup> *Id.*

<sup>58</sup> Petitioner's Brief at 8 & n.7, 9 & n.8.

<sup>59</sup> NAS Hearings at 33, January 21, 1980 (emphasis added).

<sup>60</sup> *Id.* at 327.

Richard Tabery, Senior Vice President for Maintenance Operations of United Airlines was questioned on the desirability of changing the certification process. His answer was: "We see no basis for a substantial opening up of the certification process. It has been United's experience that when a duty is shared by too many persons there may be confusion as to where the ultimate responsibility does lie."<sup>61</sup> Later he clarified the perception of his airline as to the identity of the parties sharing that duty: "That is the [domain of] the FAA and the manufacturer to produce an airworthy airplane."<sup>62</sup>

Not only members of the industry share this view. Cornish F. Hitchcock, Associate Director, Aviation Consumer Action Project, testified that, in his view: "The certification process is the pivotal stage in the area of aviation safety. In the exercise of its certification powers the FAA can and should really ensure that all the design characteristics provide maximum safety."<sup>63</sup>

Similarly an official of the Airline Passengers Association<sup>64</sup> testified that, in the view of his organization, "[i]t is the duty of the FAA to ensure that planes are properly and safely operated, built, maintained and designed."<sup>65</sup>

Subsequently, the same witness was asked:

Q. [I]s not the FAA intended to be an informed surrogate for the public, the informed and qual-

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<sup>61</sup> *Id.* at 389, January 22, 1980.

<sup>62</sup> *Id.* at 409.

<sup>63</sup> *Id.* at 435, January 23, 1980.

<sup>64</sup> At the time, the Association numbered 50,000 members, averaging 40 airline trips per year each. *Id.* at 517.

<sup>65</sup> *Id.* at 526.

ified guardian of the passengers' interest and the public interest . . . ?

A. Absolutely. That is supposed to be their duty.<sup>66</sup>

As to the division of responsibility between manufacturer, airline operator and the FAA, the same witness testified:

[I]f I might clarify it again, No. 1 with respect to the FAA and any manufacturer our complaint was never with [the manufacturer]. . . . It was never with the [airline]. . . . *Our complaint was really with the FAA. It was their duty to protect us as passengers, to assure that everything is properly done, and if there is a problem we look to them to ask why.*<sup>67</sup>

The Respondent passengers herein do not assert that the FAA *insures* their safety, but do maintain that their decedents, like airline passengers all over the world, relied on repeated *assurances* of the maintenance of minimum standards by that agency.

Such pronouncements have been as continuous over the years as they have been insidious.

In 1962, an official publication of the Federal Aviation Administration published "in the interest of aviation safety and to acquaint readers with the policies and programs of the Agency"<sup>68</sup> stated, with regard to the role of the Agency in the inspection process:

While all those connected with the industry are vitally concerned with safety, *it is the FAA's manufacturing inspectors who control final approval of the entire product as well as the components—engine,*

<sup>66</sup> *Id.* at 551-552.

<sup>67</sup> *Id.* at 564-565 (emphasis added).

<sup>68</sup> FAA Aviation News, October 1962 at 1.

propeller, even seat belts. These inspectors spend thousands of hours evaluating, checking and inspecting *to be sure* the airplane meets safety requirements.<sup>69</sup>

The same article made it clear to the public that: "The airworthiness certificate awarded the finished aircraft . . . [signifies] that the aircraft and all its parts conform to the type design and are in a condition for safe operation. *Each airplane that comes off the production line is individually inspected before the certificate is issued.*"<sup>70</sup>

A different article in the same publication a year later stated with respect to the Boeing 727 aircraft: "each airplane built will be issued an Airworthiness Certificate, the final *FAA stamp of approval indicating that the airplane conforms to the Type Certificate and is ready for safe operation in commercial service.*"<sup>71</sup>

These same pronouncements have been repeatedly made by others, over the years, including a most vocal and visible FAA Administrator, appearing before a subcommittee of the House of Representatives:

I am concerned from the standpoint of being somebody who flies on airplanes. I think [the public's] general impression of what the FAA does is guarantee them an essentially safe flight. I think when they get aboard an airplane they are under the impression that the airplane is safe, that the airways are safe,

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<sup>69</sup> *Every Day's A Busy One for FAA Manufacturing Inspectors*, FAA Aviation News, October 1982, at 12 (emphasis added).

<sup>70</sup> *Id.* at 13 (emphasis added).

<sup>71</sup> *First Boeing 727 Airliner Leaves Factory for Extensive Ground Testing*, FAA Aviation News, January 1963, at 4 (emphasis added).

and that the Government is giving them some kind of guarantee of safe passage.<sup>72</sup>

Again, the same Administrator, testifying on the question of the recertification of the DC-10 aircraft following its grounding as a result of a spectacular accident in Chicago, was asked this question and gave this answer:

Q. So far as you are concerned, based upon the experience of the last several days, the public can take confidence in the fact that, *once you recertify the DC-10's*, we are going to be assured that those are safe airplanes?

A. Yes.<sup>73</sup>

Nor can there be any doubt that this same Administrator was aware of the reliance and the legal responsibility therefor which the public placed on the inspection process:

Q. (by Congressman Walker) [Y]ou would be satisfied if we wrote the report assuring the flying public that they were flying a safe aircraft if they got aboard the DC-10?

A. (by Mr. Bond) Let me caution the committee that when it goes over into recommendations on regulatory business, it then becomes accountable for

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<sup>72</sup> *FAA Certification Process and Regulation of Illegal Commercial Operators: Hearings Before the Subcommittee on Governmental Activities and Transportation of the House of Representatives Committee on Government Operations*, 95th Congress, 2nd Sess. 353-354 (1978) (Testimony of Langhorne Bond, Administrator of the FAA).

<sup>73</sup> *FAA Certification Process: Hearings Before the Subcommittee on Governmental Activities and Transportation of the House of Representatives Committee on Governmental Operations*, 96th Congress, 1st Sess. 63 (1979) (Testimony of Langhorne Bond, Administrator of the FAA) (emphasis added).

what it recommends. That is very difficult *inasmuch as we are responsible for it all*.<sup>74</sup>

Once the certificate issues, all the governments of the world who are signatories of the Chicago Convention<sup>75</sup> may justifiably rely on the completion of inspections which lead to the issuance of certificates, and, based thereon, issue their own airworthiness certificates.<sup>76</sup> If they may rely, may not their citizens?

The District Judge knew they could. In the face of overwhelming and uncontradicted evidence, he expressly declined the Government's invitation to find that there was no reliance by any plaintiff, whether the airline itself or the individual passengers or crew members, and struck those paragraphs from the proposed Findings of Fact and Conclusions of Law.<sup>77</sup> The Court of Appeals knew it also:

Members of the flying public may not know the specific contents of the F.A.A. regulations. There is general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance of the F.A.A. of its duty to inspect and certify.<sup>78</sup>

Clearly then, the facts of this case point to the voluntary undertaking of a service, and justifiable reliance by

<sup>74</sup> *Id.* at 491.

<sup>75</sup> Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

<sup>76</sup> Beard Deposition at 54.

<sup>77</sup> Proposed Findings of Fact ¶¶ 13, 14 (E.R. 44).

<sup>78</sup> *Varig v. USA*, *supra* note 11, at 1208.



members of the class of persons to whom the service was extended.<sup>79</sup>

## II The Discretionary Function Exception Does Not Apply

In this case, a GS-13 Government inspector was required to inspect. FAR, Part 25. CAR 4b318(d). The plaintiffs contend that the evidence leads to the conclusion that he did so, but negligently. His manual, and the checklist fashioned pursuant to it, simply require him to view the design drawings, prototype or production aircraft and compare it or them with the regulation. Phrased in its simplest terms, what was required of him was a determination whether or not the trash container could contain a fire. That was a decision at the operational, not the planning level, and even if the activity were uniquely governmental, as the Petitioner argues, a breach of the duty to exercise due care would not be protected.<sup>80</sup>

## III The Misrepresentation Exception Does Not Apply

The passengers did not rely on any of the *certificates* issued by the FAA; rather they relied upon the FAA to use due care in the conduct of *inspections*. This state of facts places the case directly within the ambit of *Block v. Neal*,<sup>81</sup> and beyond the reach of the misrepresentation exception.

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<sup>79</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *United States v. Muniz*, 374 U.S. 150, 159 (1963).

<sup>80</sup> *Indian Towing Co. v. United States*, *supra* note 79.

<sup>81</sup> *Block v. Neal*, *supra* note 18.

## CONCLUSION

The Government, in its Brief argued strenuously that it cannot be held liable for regulatory activities, among which are licensing, certificating and inspecting.<sup>82</sup>

Regulatory activities, of course, include a broad spectrum of governmental conduct. And, so argues the Government, private persons by definition do not regulate or certify aircraft—only Governments do. Therefore, since by the express language of the Tort Claims Act, the Government cannot be held liable for negligence “except in the same manner and to the same extent as a private individual under like circumstances . . .,” 28 U.S.C. § 2674; it cannot be liable here.

The District Court apparently fell victim to this circular framing of the issue, for it ruled that “the United States inspection and certification of aircraft were regulatory functions, not ‘operational’ services like air traffic control”;<sup>83</sup> that the Courts may not determine Government liability without considering the liability of private persons in like circumstances<sup>84</sup> and California law does not recognize an actionable tort duty in private persons or *governmental agencies* for inspection and certification activities.<sup>85</sup>

This amounts to nothing more than a juxtaposition of a new differentiation: operational tasks vs. regulatory functions for the old “uniquely governmental” vs.

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<sup>82</sup> Petitioner's Brief at 19, 25-29.

<sup>83</sup> Findings of Fact ¶ 11 (E.R. 44).

<sup>84</sup> Conclusions of Law ¶ 2 (E.R. 44).

<sup>85</sup> Conclusions of Law ¶ 3 (E.R. 44) (*emphasis added*).

"proprietary" dichotomy that has been expressly rejected by the Supreme Court.

[The Government] argues that the Act only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and that neither the common law nor the law of Washington imposes liability on municipal or other local governments for the negligence of their agents acting in the "uniquely governmental" capacity of public firemen. But as we recently held in *Indian Towing Co. v. United States*, 350 U.S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity. To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*.<sup>\*</sup>

In other words, according to the 1957 opinion of Justice Black, the fact that no entity other than the government is currently engaged in a particular activity is no bar to liability. In fact, it begs the question, which was, is, and remains: Suppose a private person *did* inspect—or certify—would that person be liable? Under *Indian Towing*, *Rayonier* and their latest progeny, *United Scottish*

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<sup>\*</sup> *Rayonier*, *supra* note 79, at 318-319.

*Insurance Co.*, the answer is clearly "yes." To put it another way, "negligent performance of a Federal statutory duty may rise to a claim under the Act in circumstances in which applicable state law recognizes a private cause of action."<sup>57</sup>

The Government also argues strenuously that to rule otherwise would amount to placing the Government in the shoes of an insurer with all its ominous fiscal implications which the Congress presumably did not contemplate. This notion, too, apparently influenced the District Court, which ruled that the United States "in performance of its regulatory functions . . . did not undertake to insure the safety of the subject aircraft."<sup>58</sup>

Again to quote Justice Black:

The Government warns that if it is held responsible . . . a heavy burden may be imposed on the public treasury. . . . But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits

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<sup>57</sup> *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 193 (9th Cir. 1979).

<sup>58</sup> Findings of Fact ¶ 23 (E.R. 44).

from the services performed by Government employees.<sup>88</sup>

In sum, the answer given by the District Court to the question put to it by the Government was correct, but the question which it answered was not the issue in the case. And when the proper question is framed, the answer can be just one: The Court of Appeals was correct, and the Government is liable.<sup>89</sup>

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<sup>88</sup> Rayonier, *supra* note 79, at 319-320.

<sup>89</sup> See generally, Krause and Cook, *The Liability of the United States for Negligent Inspection*, 49 *Journal of Air Law and Commerce* 727, 752-53 (Fall 1983).

## CERTIFICATE OF SERVICE

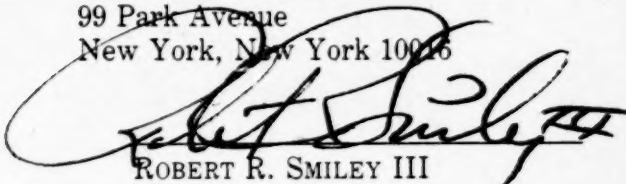
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Nos. 82-1349 and 82-1350

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,  
v. *Petitioner,*

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES), et al.,  
*Respondents.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

EMMA ROSA MASCHER, et al.,  
*Respondents.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

UNITED SCOTTISH INSURANCE Co., et al.,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**BRIEF FOR THE RESPONDENTS**

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**BRIEF FOR THE RESPONDENTS**

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**STATEMENT**

**1. THE ROLE OF THE FAA IN PRE-EMPTING THE  
FIELD OF AVIATION**

The role of the federal government in civil aviation began in 1926 when President Coolidge signed into law the first Air Commerce Act. This important legislation in-

structed the Secretary of Commerce to foster air commerce; to designate, establish, operate and maintain aids to air navigation, except airports; arrange for research and development to improve such aids; to license pilots; to issue airworthiness certificates for aircraft and major aircraft components; and to investigate accidents.

Prior to that time in 1926 when the government entered the field, aircraft were being manufactured, modified, altered, and repaired by private persons in the United States. Prior to the passage of the Air Commerce Act of 1926, no government approval or involvement was required for any of these functions. Only after December 31, 1926, the effective date of the new legislation, did the government commence the licensing and certification of airmen and mechanics. On March 29, 1927, the government began the certification of new aircraft by issuing its first aircraft type certificate number one. Prior to that date, the function of inspecting new aircraft for airworthiness was carried out by private persons.

On December 31, 1930, the government first passed regulations for aircraft components and accessories; and shortly thereafter, beginning in January of 1931, the first regulations were enacted involving alteration and repairs to license aircraft. Again, prior to the passage of these regulations by the government, all inspections, manufacture, repair, and alteration were done under the aegis of private parties. These private parties were allowed to do whatever they pleased with respect to aircraft or to their operation.

The role of the United States in pre-empting the field of aviation with regard to the inspection and certification of aircraft to assure airworthiness is similar to the takeover of the control tower operations in the United States. The procedure for the Federal Government's operation of control towers was first established on October 17, 1941; however, the takeover of the operation of towers did not begin until November 1, 1941, and approximately three



years later there were only eight control towers that were then under the operational responsibility of the Civil Aeronautics Administration.

After the government had taken over the role of inspecting new aircraft and alterations and modifications to existing aircraft, it certificated not only the mechanics who performed the actual physical work of maintenance, inspection, repair or modification, but it also certificated and delegated authority to other persons who would perform responsibilities for an inspection and designated those persons to act for the Administrator.

The pre-emption of the field by the federal government was complete with the passage of the Federal Aviation Act of 1958. The Civil Aeronautics Board retained responsibility for economic regulation of the air carriers and for accident investigation, but the mandate to promote safety in air commerce was assumed by the FAA. The role of the government is set forth in the FAA Historical Fact Book, a publication of the Department of Transportation of which the District Court below has taken judicial notice and a copy of which has been lodged with the Clerk of this Court.

The Federal Aviation Act (49 U.S.C. § 1301 *et seq.*), mandates that the FAA promote safety of flight "by prescribing minimum standards governing the design, materials, workmanship, construction and performance of aircraft. . . ." Under the Federal Aviation Act, the Federal Aviation Administration is statutorily empowered to issue certificates for the development and production of aircraft, engines and propellers (49 U.S.C. § 1423) and to issue regulations establishing minimum safety standards for the issuance of such certificates. (49 U.S.C. § 1423(a)(1)). Part 21 of the Federal Aviation Regulations (FARs) specifies in numerous subparts the certification procedures for aircraft and parts (14 C.F.R. § 21.1 *et seq.*).

The role of the FAA is to set these standards and carry out the procedures for certificating the airworthiness of aircraft. The FAA regulations are mandatory and aircraft may not be certificated without proper compliance with the Federal Aviation Regulations and inspection by the FAA. The FAA certification process varies depending upon which type of certificate is required.

Before certificating new aircraft, the manufacturer must obtain a "type certificate." The FAA must approve the design by checking design drawings for compliance with minimum safety standards. (49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53). Pursuant to 14 C.F.R. 21.33, inspection of the aircraft is required in order to assure "compliance with the applicable airworthiness and aircraft noise requirements." Additionally, 14 C.F.R. 21.147 requires the Administrator of the FAA be allowed to inspect and to make any test necessary to determine compliance with the applicable regulations in the code.

A second type of certificate issued more frequently by the FAA is called a "supplemental type certificate." The government, in its brief, failed to mention that this type of certificate is extremely relevant since this is the type of certificate issued in the *United Scottish Insurance* case. This certificate is issued pursuant to 14 C.F.R. 21.133, and is an additional certificate that is required when aircraft are altered. 14 C.F.R. 21.113 states that, "[a]ny person who alters a product by introducing a major change in type design . . . shall apply to the administrator for a supplemental type certificate. . . ." Again, each applicant for a "supplemental type certificate" must show that the altered product meets applicable airworthiness standards and *must* meet Sections 21.33 and 21.53 requirements for inspection and testing. Inspection is mandatory with regards to determining compliance with the applicable Federal Aviation Regulations.

The deposition of Charles H. McMillan, former Assistant Chief of Engineering and Manufacturing for the

FAA, taken on February 5, 1973, was received into evidence on January 30, 1975 at the District Court trial. McMillan testified in his deposition that the "supplemental type certificate," such as the one issued in *United Scottish*, would have been issued only upon a finding of compliance with regulations and inspections. (Jt.App. 281). Mr. McMillan further stated that in order to comply with the existing regulations, an inspection of the installation would have to be made. (Jt.App. 282). *United Scottish* does not involve certification of a "prototype modification." The type of alteration made was a one-time alteration which required both examination of the drawings of the proposed change and physical inspection to determine if compliance was made. (Jt.App. 281-282). In *United Scottish Insurance* the trial court found that the FAR's required that an FAA inspector inspect the heater installation. (FF 7).<sup>1</sup>

Another type of certificate issued by the FAA is the Class I Export Certificate of Airworthiness. This certificate is relevant to the *Variy* and *Mascher* cases but not to the *United Scottish* case.

## 2. THE UNITED SCOTTISH INSURANCE CASE

### a. *Statement of the Facts*

On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by respondent, John Dowdle, caught fire in midair, crashed and burned in Las Vegas, Nevada. The pilot, co-pilot Weaver, and passengers Fleming and Cearley were killed. The fire, crash and deaths were caused by a faulty fuel line to a gasoline fueled heater located in a compartment below and forward of the pilot's compartment. The heater and fuel line were negligently installed by an aircraft repair station in Dallas, Texas in 1965.

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<sup>1</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 207).

The "supplemental type certificate" provided in 14 C.F.R. 21.13, *et seq.* is the only type of certificate relevant to the *United Scottish* case. 14 C.F.R. 21.113 states that a "supplemental type certificate" must be obtained when modifying aircraft. In this case, the installation of the heater fuel line was a *one-time modification*, and as such, no plans or specifications were provided to the FAA. The only "specifications" forwarded to the FAA were Polaroid pictures taken of the "as built" installation. Under these circumstances it would have been mandatory that an FAA inspector inspect the installation and approve the aircraft for return to service. (Jt.App. 282-283). In spite of the data provided and the negligent inspection, the DeHavilland Dove was certificated as airworthy.

The trial court found that the fuel line was in violation of 14 C.F.R. 23.993. (See Jt.App. 298). The fuel line was installed by utilizing a copper fuel line mounted in the belly of the aircraft that had been part of a priming system which was no longer in use. (FF 11).<sup>2</sup> A stainless steel fuel line was coupled to the copper line with a stainless steel junction block. This line was unsupported or improperly supported for a run of approximately three and one-half feet. (FF 15).<sup>3</sup> It was placed within 1/16" of a stainless steel bolt and nut which could cause a rupture in the line. (FF 17).<sup>4</sup> The stainless steel line was free to vibrate with a fore and aft motion of approximately three inches from center in each direction and an additional horizontal motion along the face of the sloping bulkhead. This vibrational excursion was greatly in excess of that permitted by Federal Aviation

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<sup>2</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 207).

<sup>3</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 208).

<sup>4</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 208).

Regulations, and could have been eliminated by the proper use of clamps. (FF 19).<sup>5</sup>

The heater installation exhibited numerous design deficiencies which should have alerted any reasonably competent FAA inspector to the fact that the overall quality of the design and fabrication was not consistent with FAA regulations and standards (FF 21).<sup>6</sup> The heater installation was unairworthy. (FF 22).<sup>7</sup> The fire was caused by an escape of fuel from the heater fuel line because of the failure of that line along or just below the forward wall of the sloping bulkhead due to metal fatigue or chaffing caused by excessive vibrations of the fuel line. (FF 25, 26).<sup>8</sup>

After the heater line was installed along the sloping bulkhead separating the forward baggage compartment and the afterpart of the aircraft, an aluminum skin was placed over this bulkhead. The line was, therefore, not visible to subsequent mechanics or inspectors and subsequent inspections did not require the removal of this skin. It is uneconomical, unreasonable and highly unfeasible for an owner of an aircraft, inspected and certified by the Federal Aviation Administration, to take down the entire airplane and inspect it completely at each later inspection. Subsequent inspections are done only to the extent required by the Federal Air Regulations. Although the United States continues to suggest that such inspections took place, there is here no finding whatsoever that those inspections altered or modified the aircraft in any way or that they contributed in any way to the accident and certainly not that they were such an independent intervening cause of the accident so

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<sup>5</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 208-209).

<sup>6</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 209).

<sup>7</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 209).

<sup>8</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 210).

as to relieve the United States from the liability for the negligence of the FAA inspector.

If the FAA inspector had properly inspected the heater installation in accordance with FAA regulations, the aircraft repair station would have been required to either remove the installation because it was unairworthy or to modify the installation to correct the excessive vibration of the fuel line, use of dissimilar metals and other defects so as to make the installation airworthy. In either case, the accident at issue herein would not have occurred if a non-negligent, proper inspection had been made. (FF 27).<sup>9</sup> The negligence of the FAA inspector was a proximate cause of the inflight fire, crash and death of plaintiffs' decedents. (FF 29).<sup>10</sup>

#### ***b. The First Trial and Appeal***

Five lawsuits were filed as a result of the crash of the DeHavilland Dove. Three suits were for wrongful death, one suit for property damage and a subrogation claim made by the insurance companies. The trial court rendered judgment for respondents.

The District Court found that the heater installation was unairworthy and, as such, should have alerted any reasonably competent FAA inspector to the fact that the quality of the heater installation was not consistent with FAA regulations. (FF 21).<sup>11</sup> The Court further found that the government was negligent in certifying the installation in that the installation did not comply with its own regulations.

The government appealed and the Court of Appeals remanded the case to the District Court to decide the is-

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<sup>9</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 210).

<sup>10</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 210).

<sup>11</sup> Findings of Fact, First Trial, 1975. (See Jt. App. 209).

sue of whether the evidence was sufficient to support a finding of liability under the Good Samaritan Doctrine.

**c. *The District Court's Decision on Remand***

After consideration of the issues of whether California had adopted a Good Samaritan rule and if so, whether the plaintiffs' cases satisfied the rules as formulated by the state, the District Court affirmed the judgment in plaintiffs' favor. (82-1350 Pet. Cert. App. B, 8a-9a). In applying California law, which follows the Restatement view, the judge analyzed the Restatement as set forth in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965).<sup>12</sup>

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<sup>12</sup> RESTATEMENT (SECOND) OF TORTS, Section 323 (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS, Section 324A (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.



The court then determined that plaintiffs had demonstrated either that the failure of the government to exercise reasonable care in the heater inspection increased the risk of harm to plaintiffs or that plaintiffs suffered harm because of their reliance on the inspection. (82-1350 Pet. Cert. App. B, 13a). While the court was reluctant to conclude that plaintiffs' action fell within Section 323(a), it determined that plaintiffs had satisfied Section 323(b) and Section 324A.

#### **d. The Court of Appeals' Decision**

The Court of Appeals upheld the District Court's analysis of performance of service and reliance under the Good Samaritan Doctrine and stated that it was "free from error." (82-1350 Pet. Cert. App. A, 4a).

In summary, the Court noted "[T]he careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken. *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384 (D. Kan. 1977)." (82-1350 Pet. Cert. App. A, 4a).

The Court affirmed the District Court's finding that the misrepresentation exception to the FTCA pursuant to 28 U.S.C. § 2680(h) did not apply.<sup>13</sup> The Court of

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<sup>13</sup> 28 U.S.C. Section 2680(h) provides:

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Appeals held that the basis of plaintiffs' claim was "not the misrepresentation or misinformation contained in the certificate, but the negligence of the FAA's inspection on which the airworthiness certificate was issued." (82-1350 Pet. Cert. App. A, 4a). Citing *Silver Plume, supra* at 409, and *Neal v. Bergland*, 646 F.2d 1178, 1183-84 (6th Cir. 1981), *aff'd sub nom. Block v. Neal*, 103 S.Ct. 1089 (1983), the court further noted that it was the inspection undertaken to protect travelers, which if negligently performed, gave rise to the very dangers the inspection was intended to prevent and not reliance on misinformation contained in the certificate. (82-1350 Pet. Cert. App. A, 4a). It was upon this negligent inspection that the court based liability.

Moreover, the court firmly rejected the government's assertion that certificating for airworthiness falls within its discretionary function and is, therefore, exempted pursuant to 28 U.S.C. § 2680(a).<sup>14</sup> Citing *Dalehite v. United States*, 346 U.S. 15 (1953), the Court of Appeals stated:

All aircraft must comply with F.A.A. requirements in order to be certified as airworthy and thereafter placed in operation. F.A.A. officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. *Because no room for policy judgment or decision exists, a discretionary function is not being performed*, and the trial court correctly refused to protect the gov-

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<sup>14</sup> 28 U.S.C. Section 2680(a) provides:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

ernment under the discretionary function clause. (Emphasis added).

(82-1350 Pet. Cert. App. A, 5a-6a).

The *United Scottish Insurance Co.* case was affirmed and, the Court of Appeals reversed the *Varig Airlines* and *Mascher* cases.

In the *Varig* and *Mascher* cases the Court of Appeals found that the California Good Samaritan rule would permit recovery against one who negligently inspected an aircraft for compliance with a federal regulation and that neither the misrepresentation exception, 28 U.S.C. § 2680(h), or the discretionary function exception, 28 U.S.C. § 2680(a), would apply on the facts of these cases. (82-1349 Pet. Cert. (Varig) App. A, 1a-7a).

The Court of Appeals reasoned that under the Good Samaritan Doctrine as set forth in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965), the United States could be held liable because it had undertaken to perform the "service" of inspection and certification of all civilian aircraft. The Court stated that the United States, through the FAA, had voluntarily undertaken the inspection and certification of all civilian aircraft and that the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* requires the FAA "[t]o promote safety of flight of civil aircraft in air commerce" and to perform its duties "[i]n such a manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation. . . ." 49 U.S.C. § 1421. The act provides for *mandatory* certification procedure, 49 U.S.C. § 1423, and the FAA established design criteria that every aircraft must meet before being certified for flight. (82-1349 Pet. Cert. (Varig) App. A, 15a). The Court further stated:

Members of the flying public may not know the specific contents of F.A.A. regulations. There is

general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under that state's good samaritan rule. It follows that the United States also falls within the rule. Even without reference to the good samaritan rule, we have indicated that an action against the government will lie in a negligent inspection and certification case. *Arney v. United States*, 479 F.2d 653, 661 (9th Cir. 1973).

(82-1349 Pet. Cert. (Varig) App. A, 5a).

The Court also rejected the government's contention that under this ruling, it would be liable for every accident resulting from an activity subject to government safety regulation. The Court of Appeals stated that the United States could only be liable when injury resulted from negligent performance of its duty. The voluntary undertaking to inspect and certificate gives rise to a duty to inspect and certify with reasonable care. (82-1349 Pet. Cert. (Varig) App. A, 6a).

## SUMMARY OF ARGUMENT

### I.

The battle over whether an actionable duty arises from a violation of the Federal Aviation Act of 1958, and its predecessors, and the regulations promulgated by the Federal Aviation Agency to carry out the terms of the Acts, has been hard fought on many fronts. After the United States waived its immunity from liability in tort

in 1946 with the passage of the Federal Tort Claims Act (hereinafter FTCA), the government has defended many suits for injuries arising from aviation accidents. Initially, the United States relied on the defense that no actionable duty was owed to the claimants or to their decedents, but only to the public at large. This argument was rejected and the government was not allowed to shield itself from liability.

The battle presently being waged is over the interpretation of the provisions in the FTCA which state whether the United States shall be liable for the negligent acts of its employees "under the circumstances where the United States, if a private person, would be liable to the claimant" and "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §§ 1346(b), 2674 (1976).

A line of defense asserted by the United States is that the FAA cannot be held liable under the Good Samaritan Doctrine because the United States did not perform a necessary service for respondents but was acting in a regulatory capacity. It also asserts that respondents did not and could not reasonably rely on the FAA's inspections and certifications in these cases. The issue of whether the government, in inspecting aircraft, is acting in its regulatory capacity was decided by the court in *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973). Here, even though reliance is not a necessary element it was specifically found by the trial court.

The United States is also attempting to resurrect a third line of defense and contends the discretionary function exclusion of the FTCA bars recovery. In one confrontation after another, the courts have held that negligent acts of the government such as we have here are operational rather than discretionary.

Finally, the United States has retreated, regrouped, and begun asserting another major defense in negligent

inspection cases, the misrepresentation exclusion to the FTCA. Again the courts have disagreed and a case by case analysis of the decisions, particularly the recent case *Block v. Neal*, 103 S. Ct. 1089 (1983), is set forth in section IV of this brief.

## ARGUMENT

### **I THE FEDERAL AVIATION REGULATIONS PROMULGATED BY THE FEDERAL AVIATION ADMINISTRATION SPECIFICALLY APPLY TO PRIVATE PERSONS AS WELL AS TO FEDERAL GOVERNMENT EMPLOYEES**

The reasoning of the government is circular in nature. It asserts that its activity falls within a regulatory function of the government and since this activity falls within a regulatory function of the government, it is not an activity that could be carried out by private persons. Therefore, since no private person could be held for this activity the United States cannot be held liable either. Yet, in its brief, the United States acknowledges that Designated Engineering Representatives (DERs), *private persons* assisting the FAA, do the majority of the inspection and review of designs for certification. Likewise, almost all of the 100 hour, periodic and annual inspections of both private and air carrier aircraft are done by private mechanics licensed for that purpose by the FAA. It, therefore, appears that private individuals do carry out inspections and without argument are liable in tort if they do so negligently. It is true that the government's reasoning might apply to the promulgation of regulations, but we are not complaining about the failure of the United States to pass proper regulations, more stringent regulations or any regulations. The sole claim is that an FAA employee charged with the day-to-day duty of carrying out regulations properly promulgated was negligent in doing so.

It has long been the law of California that a person who is negligent in failing to properly inspect machinery may be held liable to individuals injured as a result of that negligence. See *Dahms v. General Elevator Co.*, 214 Cal. 733 (1932); *Sheward v. Virtue*, 20 Cal.2d 410, 413 (1942).

The Court of Appeals concluded that courts may not determine governmental liability without considering the liability of a private person in "like circumstances" pursuant to relevant state law. The District Court in *United Scottish* conducted an extensive trial and found that prior to the passage of Federal legislation all inspections were conducted by private persons and most inspections still are.

The Court of Appeals stated that in certifying and inspecting aircraft, the United States has no interest of its own to protect. The Court noted that the government itself acknowledges the FAA's activities are performed for the public as a whole. When voluntarily performing activities solely for the safety of the public, the FAA performs a service for another. See *Arney v. United States*, *supra*. (82-1350 Pet. Cert. App. A, 3a; 82-1349 Pet. Cert. (Varig) App. A, 5a).

Prior to the government entering the aviation field in 1926 with the passage of the first Air Commerce Act, aircraft were being manufactured, modified, altered, repaired and inspected by private persons in the United States. As in all other fields, they were liable for negligence in any one of those activities to anyone injured by such negligence. The role of the United States in preempting the field of aviation with regard to the inspection and certification of aircraft is similar to the takeover of the control tower operations by the United States. The question as to whether or not the United States could be held liable for the negligence of its employees in operating control towers now appears clear. But, in the early cases the United States insisted that its



tower operators performed governmental functions of a regulatory nature, that no private individual had such power of regulation, and therefore, the Federal Torts Claims Act did not permit suit based on negligent performance of their duties. Such contentions have uniformly been rejected by the courts in the control tower situation. *Eastern Airlines v. Union Trust Company*, 221 F.2d 62 (D.C. 1955), *aff'd sub nom. United States v. Union Trust Company*, 350 U.S. 907 (1955); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2nd Cir. 1967). Here, as in the air controller cases, the United States has taken over voluntarily a function which had previously been conducted by private persons. In fact, unlike the air controller cases, here the functions are still carried on in great part by private persons.

The government having voluntarily assumed a duty, the breach of which would create liability on a private person, is liable when one of its employees negligently fails to carry out that duty. See *Silver Plume*, *supra*. Those cases cited by the United States, such as *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), do not hold to the contrary but merely hold that there has been a failure of proof of one of the elements necessary to hold the government for a Good Samaritan assumption of duty and breach thereof. In the *Raymer* case, for example, there was a failure to prove reliance. In the instant cases reliance on FAA inspections was specifically found by the courts.

The Court of Appeals' interpretation of private person liability is consistent with that of this Court in *Indian Towing Company v. United States*, 350 U.S. 61, 64 (1955), where the FTCA was construed as rendering the United States liable in tort as a private individual would be under like circumstances even though private persons do not now maintain light houses. In these cases the issue is not negligent licensing or certification, but negligent inspection by an FAA inspector. Clearly, pri-

vate persons in many different situations conduct inspections of products, premises, and activities. In the area of products liability, manufacturers of products ranging from airplanes to children's toys have the affirmative duty to inspect their products before those products are placed on the market. See *Sheward v. Virtue*, *supra*. Retailers, owners of buildings and contractors conducting hazardous activities have affirmative duties to inspect the product or the area and are held liable for failure to do so where injury results. See *Dahms v. General Elevator*, *supra*.

In *Gibbs v. United States*, 251 F. Supp. 391, 400 (E.D. Tenn. 1965), the court interpreted the private person requirement as follows:

Having decided to enter the broad field of the regulation of the flight and repair and modifications of the aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted. *It may no longer take refuge behind the distinction between proprietary and governmental functions.* But, the Government nevertheless does not become an insurer. Its liability is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances. (Emphasis added).

It is clear from the cases that private persons may be liable for violations of duties imposed by the Federal Aviation Act of 1958 and the regulations promulgated thereunder.

For example, in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972), the court asserted jurisdiction over Hughes Airwest, a private corporation, precisely because their liability was predicated on violations of the FARs.

In *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3d Cir. 1968), the issue was whether the pilot was liable

for violating FARs relating to visual flight regulations, and the Third Circuit affirmed the judgment for the plaintiffs. Again, the government was not a party, and liability based on a violation of the FARs was found against a private person. Other courts which have based private liability on a violation of the FARs include the Nebraska Supreme Court in *Lock v. Packard Flying Services, Inc.*, 185 Neb. 71 (1970), and *Bibler v. Young*, 492 F.2d 1351 (1974).

A recent case to affirm the duty of care imposed by the FARs is *Delta Airlines, Inc. v. United States*, 561 F.2d 381, 389 (1st Cir. 1977). Liability of the defendant was premised upon the undertaking to provide services not otherwise required which were not performed with due care. There was no finding or analysis of the private person requirement of the FTCA. The controller cases are not distinguishable on either the reliance issue or otherwise as discussed below.

It is well established that an actionable duty arises from a violation of the Federal Aviation Act of 1958 and the regulations promulgated thereunder. Such actionable duty should apply to the government as well as to private parties.

## II. THE UNITED STATES IS LIABLE UNDER CALIFORNIA'S GOOD SAMARITAN RULE FOR NEGLIGENCE IN THE FAA INSPECTIONS BECAUSE OF INCREASED RISK OF HARM AND ASSUMPTION OF DUTIES OWED BY OTHERS

### 1. *The FAA's Negligence in Undertaking to Inspect the Aircraft Increased the Risk of Harm to Respondents*

California has adopted the Restatement view as set in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965).<sup>15</sup> "Although an individual need do

<sup>15</sup> See n.12, *supra*.

nothing to rescue another from a peril not of that individual's own making, *he who undertakes to do an act must do it with due care.*" (Emphasis added). *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal.App.2d 69, 71 (1968). Where one volunteers to do an act, however gratuitous, one must use reasonable care in the performance of the act once it has been undertaken. If the act is done negligently, there is liability. *Coffee v. McDonnell-Douglas Corp.*, 8 Cal.3d 551, 557 (1972); *Schwartz v. Helms Bakery, Ltd.*, 67 Cal.2d 232, 238 (1967); *Keene v. Wiggins*, 69 Cal.App.3d 308, 316 n.4 (1977).

*Coffee v. McDonnell-Douglas Corp.*, *supra*, is directly on point. There the company, as a matter of corporate policy, required each of its prospective employees to undergo a physical examination to ensure that he was physically fit. The California Supreme Court held that where the company voluntarily assumed the duty of medically examining possible employees to determine fitness, it would be liable to those persons when it negligently performed the medical examination. Clearly, if the FAA voluntarily assumes the duty of examining and inspecting aircraft to determine their airworthiness, it will be liable for injury where it negligently performs that inspection.

The government contends that in order to satisfy the Good Samaritan Doctrine, it must be shown that the purpose of the action was to render a direct service to the person who was harmed, or to persons of that class. (82-1350 Pet. Cert., 30). However, the RESTATEMENT (SECOND) OF TORTS and the cases are to the contrary.

In *Moyer v. Martin Marietta Corp.*, 481 F.2d 585, 598 (6th Cir. 1973) the United States was held liable for approving the plans for a defective ejection system which led to a fatality. In this case, the government not only approved plans but negligently inspected the actual defective heater. The trial court reasoned that without the government's negligence, there would not have been a

heater in the aircraft and the aircraft, would not have crashed. Therefore, there was also evidence sufficient to support a finding of liability under the test of the Restatement, Section 323.

In *Raymer v. United States*, 660 F.2d 1136, 1140 (1981), the Government relied upon an argument similar to the one in the present action. It argued that an inspection done by the Bureau of Mines Department of Interior was an activity which was "uniquely governmental" in scope and, therefore, not within the Good Samaritan Doctrine.

The *Raymer* Court citing *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955), flatly rejected the government's contention.

[I]t is not determinative that private individuals do not engage in regulatory inspection and enforcement activities. *If there are similar activities whose negligent performance by a private individual under like circumstances results in liability under applicable state law, a cause of action exists under the Federal Tort Claims Act.* (Emphasis added).

Thus, the Government may not avoid liability in this case where its negligent inspection would also expose a private person to liability if such "similar activity" was negligently performed.

Although the *Raymer* court did not find liability against the United States, its discussion of the Good Samaritan Doctrine as it pertains to negligent inspection by the United States is wholly consistent with that of the trial court in *United Scottish* which held that the plaintiffs had satisfied the requirements of RESTATEMENT, Section 323(b).

The trial court also held that the plaintiffs satisfied the requirements of Section 324A. The Good Samaritan rule as set forth in Section 324A of the RESTATEMENT (SECOND) OF TORTS (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The facts of this case bring it within all three of these alternative paths to liability. The United States rendered services to the installer of the heater and to the owner of the aircraft. The installer owed a duty to the owner to protect the aircraft and its occupants from harm; and the owner, in turn, owed a duty to protect the occupants from harm, each by furnishing an airworthy airplane.

Placing the heater and its associated defective fuel line in the aircraft increased the risk of harm to the aircraft and its occupants to such a degree that they all were destroyed or killed. Such alteration required design, actual installation, and inspection. The government inspector negligently carried out the latter part of this alteration and, with the installer, contributed to increasing the risk of harm, bringing this case squarely within the provisions of § 324A (a).

The Government, by undertaking the duty to inspect, one of the duties owed by the installer to all subsequent users of the aircraft, has brought itself precisely within the provisions of § 324A (b) and because of the negligence of the Federal Aviation Administration inspector is subject to liability for the resulting deaths and harm; as the

installer would have been if the Government had not pre-empted the activity.

Reliance by the decedents herein is not an element of either § 324A(a) or (b), and liability of the government would attach even without the clear finding herein of reliance by the decedents.

Liability also attaches under 324A(c) whether the reliance upon the careful performance of a gratuitous undertaking is by the person or persons to whom the services are rendered *or* by the third person or persons who are to be protected. Thus, reliance by the installer of the heater or the owner of the aircraft is sufficient to satisfy the rule even without the finding by the District Court that there was reliance by the passengers and crew of the aircraft.

Had private industry been left to regulate itself, as was the case prior to government involvement, this type of catastrophic accident probably would not have occurred. The United States has undertaken to regulate and control aviation, and as a good samaritan, must carry out its undertaking in a *non-negligent* manner. The government has shown that its purpose is to render a direct or indirect service to the public; and as such, the Good Samaritan Doctrine is applicable.

## **2. Respondents Relied on the FAA's Certification and Inspections in These Cases**

Much of the testimony presented by respondents on remand to the District Court went to the issue of reliance by the owners, the mechanics, respondents, the passengers, the pilots, the FAA inspectors performing subsequent inspections, the aviation industry generally, and the general air-traveling public. The items of which the District Court took judicial notice, including the provisions of the Federal Aviation Act itself which stress the promotion of safety, evidence a comprehensive scheme



by the FAA to do everything possible to properly determine which aircraft are airworthy and which are not. It is not only the pre-emption of the entire field of aviation that has created the general reliance by everyone concerned in aviation, it is the outstanding success the FAA has enjoyed in publicizing its role in air commerce.<sup>16</sup>

The Court in *Arney v. United States*, *supra*, recognized that the government may be liable for negligent inspection of aircraft. In *Gibbs v. United States*, *supra* at 399, the District Court in Tennessee, without discussion of the applicable state law, found liability would exist for negligent inspection had that negligence been found to be the proximate cause of the accident. In *Moyer v. Martin Marietta Corp.*, *supra* at 598, the Court recognized the United States could be liable for acceptance of an ejection system which is negligently designed and constructed posing a safety hazard to the individual operating the aircraft. In *In re Silver Plume*, *supra* at 408-9, the District Court found that because the FAA had preempted and assumed the duty of inspecting aircraft, the government would be liable for a negligently performed inspection where that negligence is the proximate cause of the passengers' injuries.

All the preceding cases provide a foundation which recognized that where proper evidence of reliance upon the inspection is presented, the negligence of the FAA inspectors will impose liability upon the United States. The Court of Appeals agreed with the District Court's decision in this case that evidence of reliance was sufficient. (82-1350 Pet. Cert. App. A, 12a-13a; 82-1349 Pet. Cert. (Varig) App. A, 4a-5a).

Under California law, private persons are liable for the negligent performance of services undertaken even

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<sup>16</sup> See Federal Aviation Administration, *World*, January, 1981. (U.S. Department of Transportation). A copy has been lodged with the Clerk of this Court.

gratuitously which they should recognize as necessary for the protection of the other person or party where the harm is suffered because of the other's reliance on the undertaking. Reliance was abundantly shown in the evidence presented on remand.

It is absurd for the government to argue that the respondents could not rely on the FAA when the FAA, in its own publication, suggests that it will issue "what amounts to a warranty" over and above the warranty offered by the manufacturer before aircraft can go into passenger service.<sup>17</sup>

Respondents have shown that the United States would be liable as a private person under the Good Samaritan Doctrine in that the respondents have relied on the government to perform its duties of regulating and certifying in a non-negligent manner. Furthermore, the FAA expects the public to rely and concludes that the respondents and the public have confidence in their ability to carry out these responsibilities.

### **III. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA DOES NOT PROTECT THE GOVERNMENT FROM LIABILITY FOR OPERATIONAL ERRORS SUCH AS NEGLIGENT INSPECTION**

Although the government on the first appeal of this case in 1977, abandoned any reliance on the discretionary function exception to the FTCA, it now attempts to resurrect that long dead issue. The government correctly states that in the abstract the discretionary function exception to the Federal Tort Claims Act precludes governmental liability for claims "based upon the exercise or performance or the failure to exercise or preform a discretionary function or duty. . . ." 28 U.S.C. § 2680(a).

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<sup>17</sup> Id.

However, this exception clearly does not apply to the facts of these cases.

The discretionary function exemption was designed to preclude tort claims arising from decisions by executives or administrators when such decisions require policy choices. *Dalehite v. United States*, 346 U.S. 15, 35-6 (1953). However, the inspection and certification process employed by the FAA requires FAA inspectors to follow FAA safety regulations to ensure compliance. Aircraft must comply with the FAA regulations, or they *may not* be certified. There is no room for policy decisions after the FAA has undertaken to prescribe rules and regulations. Those rules and regulations create a duty for aviation inspectors that cannot logically be included under the definition of discretionary function.

Air controller cases are among the cases that distinguish policy decisions from operational tasks. *Eastern Airlines, Inc. v. United Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955); *United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2d Cir. 1967); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970). A task is discretionary if it involves choice, judgment, planning or policy decisions. The FAA's duty to respondents involved enforcement of mandatory regulations at the operational level. The FAA inspector was required to inspect the aircraft pursuant to set standards and regulations. Any deviance from these standards is negligence at the operational, not the planning level. The inspector cannot in any way change or waive safety requirements. (82-1350 Pet. Cert. App. A, 5a-6a; 82-1349 Pet. Cert. (Varig) App. A, 6a-7a).

In *Indian Towing v. United States*, 350 U.S. 61, 64-5 (1955) the Supreme Court refused to allow the discretionary function exemption to lighthouse keepers whose negligent inspection of lighthouse facilities caused a ship to run aground. The Court of Appeals in the *Varig* and

*Mascher* cases stated that "[t]he duties undertaken by FAA inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the cabinet level secretaries in *Dalehite*." (82-1349 Pet. Cert. (Varig) App. A, 7a). In *United Scottish* and the *Varig* and *Mascher* cases, the government promulgated specific and exacting standards with which to determine compliance with certification procedures. The FAA's duties are mandatory on an operational level, not discretionary.

In *Harr v. United States*, 705 F.2d 500 (D.C. Cir. 1983), the court disallowed the use of the discretionary function exception to the FTCA. Plaintiff sought damages from the FAA for negligent denial of his pilot medical certification. The court concluded that Harr's allegations, if proved, would establish liability in that the certification involves duties prescribed by the FAA. The court explained that in applying the discretionary function exception, the specific medical licensing regulation would have to be examined to determine whether FAA officials were left with "a range of policy judgment as to whether to grant a license, or whether the officials are simply required to match these deficiencies against a clear medical standard." *Supra* at 502-3. The court held that the latter applied and that the FAA's duty to determine whether to grant the license did not involve a discretionary decision within the meaning of 28 U.S.C. § 2680(a).

Similarly, the FAA regulations used for certifying aircraft and alterations on aircraft were here examined by the Court of Appeals to determine whether officials had to make policy decisions or whether certification was granted against clear standards. The Court of Appeals found inspection to be mandatory to determine compliance and not a *discretionary* function within the meaning of 28 U.S.C. 2680(a). (82-1350 Pet. Cert. App. A, 5a).

#### IV. A NEGLIGENT INSPECTION DOES NOT FALL WITHIN THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

The United States argues that the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h) bars recovery in this case even though the acts of the inspector were negligent. It suggests that the reasoning of the Court of Appeals herein was inconsistent with this Court's decision in *United States v. Neustadt*, 366 U.S. 696, 706 (1961).

The government's reliance is clearly misplaced. In a footnote at the end of the *Neustadt* opinion, the court indicated its holding would not relieve the government of liability in cases like *Indian Towing*, a case which the District Court on remand found "particularly significant as it applies to this case." (Reporters Transcript, page 61). The *Neustadt* court stated:

Our conclusion neither conflicts with nor impairs the authority of *Indian Towing v. United States*, 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation" in the generic sense of that word, but "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser, *Torts*, Section 85, pages 702-703 (1941 Ed.).

*Neustadt*, *supra* at 706 n.26.

This same language from the *Neustadt* decision was quoted by the Court in *Ramirez v. United States*, 567 F.2d 854, 856-7 (9th Cir. 1977), *en banc*, where it was stated: "The misrepresentation exclusion presumably protects the United States from liability in those many situations where a private individual relied to his *economic detriment* upon the advice of a government official." (Emphasis added). The *Ramirez* decision went on to state that in a medical malpractice action the failure to warn of risks attendant to surgery as had been alleged by Ramirez did not constitute a misrepresentation within the meaning of the Federal Tort Claims Act. *Supra* at 856-7.

The distinction between actions of a *commercial* or *business* nature and those involving personal injury and death was stressed in *Green v. United States*, 629 F.2d 581, 585 (9th Cir. 1980) where the court stated:

Though we recognize that the decisions in this area may not be fully reconcilable, our view of the misrepresentation exception is consistent with case law construing the provision. Where the plaintiffs' injuries were not commercial, as, for instance, in the airplane crash cases, e.g., *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967); *United Airlines Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964), and the medical services cases, e.g., *Ramirez, supra*; *Betesh v. United States*, 400 F. Supp. 238 (D.D.C. 1974), courts have generally ruled that the exception does not preclude claims based on the government's failure to inform. See also *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). On the other hand, the exception has usually been held to bar claims for damages resulting from commercial decisions based on false or inadequate information, e.g., *Neustadt, supra*; *Preston, supra*; *Cargill, supra*;

*Scanwell Laboratories v. United States*, 251 F.2d 941, 947-48 (D.C. Cir. 1975).

In light of these cases and *Block v. Neal*, 103 S.Ct. 1089 (1983), the Court of Appeals' decision is clearly correct. (82-1350 Pet. Cert. App. A, 4a-5a; 82-1349 Pet. Cert. (Varig) App. A, 6a). The Court of Appeals found respondents' claims to be grounded in negligence "rather than from any ensuing misrepresentation contained in the resultant certificate."

The *Block v. Neal* case reiterates that respondents' cases are different from the type of misrepresentation referred to in *Neustadt*. In *Neustadt*, the gravamen of the action against the government was communication of misinformation upon which the recipient relied. This Court distinguished *Neustadt* from *Block* stating that "Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal." *Block* at 1093.

This Court stated further:

Section 2680(h) relieves the government of tort liability for *pecuniary* injuries which are wholly attributable to reliance on the government's negligent misstatements. As a result, the statutory exception undoubtedly preserves sovereign immunity with respect to a broad range of government actions. But does not bar negligence actions which focus not on the government's failure to use due care in communicating information, but rather on the government's breach of a different duty.

*Block, supra* at 1093-4.

The facts in respondents' cases are similar to the facts in *Block* in that the Court of Appeals found that to prevail under the Good Samaritan Doctrine, plaintiffs must show a voluntary undertaking to supervise inspection; that the official failed to use due care in carrying out



their supervisory activity; and that some injury was proximately caused by the official's failure to use due care.

In discussing FmHA's duty to use due care, this court stated that this duty was "distinct from any duty to use due care in communicating information to respondent." In footnote five of the *Block* decision, this distinction was made clear.

5. The Court distinguished negligent misrepresentation from the "many familiar forms of negligent misconduct [which] may be said to involve an element of "misrepresentation," [only] in the generic sense of that word." 366 U.S., at 711, n.26, 81 S.Ct., at 1302, n.26. *The "misrepresentation" exception applies only when the action itself falls within the commonly understood definition of a misrepresentation claim, which "has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."* (Emphasis added) *Id.* quoting *W. Prosser, Torts* § 85, at 702-703 (1941 ed.). Thus, the claim in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), for damages to a vessel which ran aground due to the Coast Guard's alleged negligence in maintaining a lighthouse, did not "aris[e] out of . . . misrepresentation" within the meaning of § 2680(h).

*Block*, *supra* at 1093.

The "partial overlap" of a negligence claim and a misrepresentation claim will not preclude the negligence claim if the misrepresentation claim is excepted under the Tort Claims Act. This court stated further:

Neither the language nor history of the Act suggest that when one aspect of the government's conduct is not actionable under the "misrepresentation" exception a claimant is barred from pursuing a distinct claim arising out of other aspects of the govern-

ment's conduct. *Any other interpretation would encourage the government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.* (Emphasis added).

*Block* at 1094.

## CONCLUSION

The deaths and damages which give rise to these cases were contributed to by the negligence of an employee of the FAA in performing a routine mandatory inspection of an alteration of an aircraft that later crashed and burned. Such routine inspections are carried out at the operational level rather than the policy level. The inspector has no discretionary function to perform but must determine whether the inspected aircraft complies with mandatory standards. This conduct is not shielded from liability by the discretionary function exception to the Federal Tort Claims Act.

The cases also do not fall within the misrepresentation exception to the FTCA. The conduct complained of consisted not of the issuance of the airworthiness certificate but of the negligent inspection which would have been one of the causes of the injuries suffered herein even if no certificate had ever been issued.

The government did not have to enter the field of aircraft regulation. Even after the decision had been made to regulate aircraft manufacture, inspection and alteration the FAA did not have to pass most of the existing Federal Air Regulations. It could have left all inspection in the hands of private persons who would be responsible to anyone injured by their negligence. Having taken over these functions and after deciding to have them performed by governmental personnel the government must be held to the same standard as those private persons would be, the exercise of reasonable care. Of course, the government will retain all of the defenses a private per-

son might have had and plaintiffs must prove negligence and causation, as they have here.

Whether the cases are analyzed within the Good Samaritan Doctrine or merely as cases of liability for breach of duty based on federal statutes and regulations the result should be the same. In that the negligence of a government employee caused the damages herein, the government should be liable.

The judgments should be affirmed.

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Nos. 82-1349 and 82-1350

Office - Supreme Court, U.S.

FILED

JAN 10 1984

ALEXANDER L. STEVAS.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE  
(VARIG AIRLINES)

---

UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

---

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR THE UNITED STATES

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
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---

**REPLY BRIEF FOR THE UNITED STATES**

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1a. Relying upon a handful of statements by FAA employees and irrelevant materials from one of the FAA's certification manuals, respondents (Mascher



Br. 13-23; Varig Br. 10-16; United Scottish Insurance Br. 24) argue that the FAA's role in the inspection and certification process is to check every part in every aircraft that is certified and thereby, in effect, to warrant that each aircraft complies with the minimum safety standards the FAA promulgates by regulation. There is nothing, however, in the FAA's statute, regulations or manuals that indicates that the agency's role is anything other than that of a "policeman" of the industry; the FAA's regulatory process places the responsibility for assuring that each aircraft meets minimum standards on the manufacturer or operator of the aircraft.<sup>1</sup> Thus, 49 U.S.C. 1425(a) requires that every person "operating, inspecting, maintaining, or overhauling equipment" used in air transportation must observe and comply with the Secretary's safety standards. Similarly, 14 C.F.R. 21.33(b) (1) obligates the applicant for a certificate to "make all inspections and tests necessary to determine \* \* \* [c]ompliance" with the FAA's safety standards. Finally, the agency's operating manual has *always* stated that "[i]t is the primary responsibility of manufacturing inspectors to determine that prototype products \* \* \* conform with" safety requirements. Civil Aeronautics Admin., U.S. Department of Commerce, *Manual of Procedure—Flight*

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<sup>1</sup> Respondent Varig asserts (Varig Br. 9) that we have introduced a new issue by describing how the FAA conducts its business, as reflected in the statute, regulations and internal operating manuals. But these cases turn directly on the nature of the agency's statutory responsibilities. Respondent Varig also cannot complain about our reliance on the FAA's operating manuals. It admits (Varig Br. 9 n.9) that it obtained a copy of at least one operating manual through discovery. More importantly, these are public documents that describe how the agency conducts its business.

*Operations and Airworthiness*, Ch. 201, "Type Certification" 11-1 (rev. 1957).<sup>2</sup> In turn, the FAA is merely empowered to make safety inspections and to

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<sup>2</sup> Respondent Varig points out (Varig Br. 9-10) that the specific manuals upon which we relied in our opening brief did not exist at the time of the certifications in the *Varig* case. But the manual Varig has lodged with the Court contains the identical provisions.

The differences in the provisions cited by Varig and those cited in our opening brief do not reflect differences in the manuals, but rather reflect differences in our respective views regarding which provisions are applicable to these cases. Respondent Varig *alone* characterizes its case as involving *only* "type certification" and asserts that the FAA has undertaken absolutely to review all safety standards at the design stage of the certification process. The Mascher respondents do not similarly limit their claims. Indeed, this is the first time Varig has so cabined its analysis. Its complaint includes allegations of negligence in inspections at all phases of the certification process (J.A. 17, 19-20) and its brief in opposition to the government's motion for summary judgment was not limited to type certification.

The problem with Varig's attempt now to limit its case to design certification is that there is nothing that indicates that the design of the Boeing 707 was defective. All of the evidence cited by Varig involves the actual lavatory waste container in a sister airplane owned by Varig. Not one witness for respondents testified that he had ever looked at the design of the airplane or that it failed to comply with FAA standards. In any event, Varig acknowledges (Varig Br. 12) that, even at the design certification stage, the FAA inspectors need not check all data from the applicant, and a cursory glance at the fire prevention portion of the FAA's *Manual of Procedure*, *supra*, at 28-32, shows that it is referring to the standards relating to the design of the power plant, intake systems and exhaust systems that are likely to ignite during the operation of the aircraft.

ground any aircraft that is not in condition for safe operation. 49 U.S.C. 1425(b).

Thus, the official materials that define how the agency regulates the aircraft industry indicate that the FAA's role is one of law enforcement. As we explained in our opening brief (U.S. Br. 4-9), when the FAA conducts an inspection for an initial or supplemental type certificate, it does not purport to check every part of the aircraft or modification.<sup>3</sup> Rather, the agency's power to inspect, like many other kinds of law enforcement authority, is designed to have an *in terrorem* effect—to spur manufacturers and operators to comply fully with the FAA's safety standards, knowing that the agency possesses the authority to scrutinize every aspect of every aircraft for itself. General statements by individual employees in depositions—made in response to vague questions—suggesting that the FAA ideally endeavors to make sure that every safety requirement is satisfied cannot alter the agency's basic regulatory role as set out in its statutes and regulations. Cf. *Schweiker v. Hansen*, 450 U.S. 785 (1981).

b. Because the FAA performs a regulatory enforcement function, its role is limited to ensuring that other persons, with direct operational responsibilities, conform to established safety standards. Thus, con-

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<sup>3</sup> Varig relies (Varig Br. 16) on a blank checklist for its assertion that the lavatory waste receptacle was not inspected prior to issuance of the type or airworthiness certificates. But that checklist was produced by Boeing as merely a sample checklist used by FAA employees. There is no evidence that this blank checklist was used for the inspection of the Boeing 707 in 1958.

trary to respondents' claim (Varig Br. 24; Mascher Br. 23), this case is plainly distinguishable from cases in which the federal government assumed direct operational responsibility and, as a result, was held liable for negligent performance of those operations under the Tort Claims Act.

Respondents nonetheless assert that the oversight responsibilities of the FAA cannot be distinguished from the failure of the federal prison officials in *United States v. Muniz*, 374 U.S. 150 (1963), to "supervise" inmates. But the "supervision" in *Muniz* was still part of the operation of the federal prison; the United States had the *sole* responsibility to protect inmates in its prison. A proper analogy to this case would be a suit for damages brought by an injured *state* prisoner, claiming that the United States undertook the responsibility to certify state-operated prisons but failed to discover some deficiency in how state officials supervised their prisoners. *Muniz* in no way suggests that liability would extend to the United States in such a regulatory context.<sup>4</sup>

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<sup>4</sup> Nor does the fact that this Court upheld liability against the United States for negligence by air traffic controllers, *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955), require holding the government liable for claims arising out of the FAA's inspection and certification function. The court of appeals in *Zabala Clemente v. United States*, 567 F.2d 1140, 1147-1148 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978), correctly distinguished air traffic control from the FAA's regulatory activities:

[W]hile we can understand how one could generalize from the air controller's duties to the responsibilities of FAA inspectors, both history and policy establish that

Respondents assert (Varig Br. 25; Mascher Br. 6-7) that our attempt to withdraw the government's inspection and certification process from the ambit of the Tort Claims Act is textually unsupported and therefore represents an attempt to imply an exception into the Act. However, respondents ignore the teaching of this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950), which held that the "private person" limitation in 28 U.S.C. 1346(b) excludes liability for certain "governmental functions."

The District of Columbia Circuit recently recognized this precise point in *Jayvee Brand, Inc. v. United States*, No. 82-1167 (Nov. 15, 1983), slip op. 8, in stating that "[o]ne plausible reading of [Section 1346(b)] is that there remains some distinction between private and governmental action so that not all wrongful acts by the government subject it to tort

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the differences between the two are extensive and require different legal consequences. \* \* \*

\* \* \* \* \*

Tort liability is intrinsic in the [air traffic controller] function; once the government took control of the air towers it became subject to the duties that would devolve on any entity that took on such responsibility. There is no comparable duty related to the role of FAA inspector.

Moreover, in the air traffic controller situation and the other cases cited by respondents involving direct operations by the federal government, if the United States were not liable under the Tort Claims Act "the entire burden [would] fall[] on the injured party \* \* \*." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957). By contrast, in cases involving a government agency's alleged failure adequately to regulate the conduct of private persons, the injured party may recover damages from the private persons—the true tortfeasors—as respondents did here. See U.S. Br. 11 n.11, 15 n.16.

liability." The court went on to reason that "quasi-adjudicative" action by an agency, which is comparable to how the FAA's certification process has been characterized (U.S. Br. 41 n. 37), "is action of the type that private persons could not engage in and hence could not be liable for under local law." *Jayvee Brand, Inc.*, slip op. at 9. Thus, our submission that the FAA's certification function is not a proper basis for liability under the Act is readily supported by the language of and congressional intent underlying the "private person" limitation in Section 1346(b) and does not require the Court to "imply" any new exception into the Act.<sup>5</sup>

2. In arguing (Varig Br. 29-37; Mascher Br. 10-23; United Scottish Br. 19-25) that the government is liable as a good samaritan for negligence in performing its certification function, respondents ignore the basis for the holding of the court of appeals and disregard the inherent limitations on the doctrine as set out in the Restatement (Second) of Torts. The court of appeals held that good samaritan liability was appropriate here solely on the ground that respondents relied generally on the FAA's regulatory activities. See 82-1349 Pet. App. 5a; 82-1350 Pet. App. 4a; Restatement (Second) of Torts §§ 323(b) and 324A(c) (1965). The court of appeals did not disturb the district court's finding that the FAA had not increased the risk of injury to respondents (*id.* at

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<sup>5</sup> Respondent Varig asserts (Varig Br. 26 n.19) that the statement by Representative Gwynne during the 76th Congress (U.S. Br. 22) that the Act did not extend to suits based on governmental functions was "referring to the discretionary function exception to the Act." Respondent's claim is plainly incorrect since the discretionary function exception was not included as part of a Tort Claims Act proposal until the 77th Congress. See U.S. Br. 40.

§§ 323(a) and 324A(a)) and the court of appeals found no need even to mention Section 324A(b), which imposes liability if the good samaritan undertakes to perform the duty of the primary actor. 82-1350 Pet. App. 2a, 14a. As we explained in our opening brief (U.S. Br. 8, 33, 34), the manufacturer or operator retains the duty to inspect the aircraft and guarantee that it is safe; the FAA plainly does not undertake to substitute in the performance of that duty.<sup>6</sup>

Respondents United Scottish (Br. 22-23), attempting to avoid having to prove specific reliance as required by Section 324A(c), claim that the FAA increased its risk of injury. Respondents' theory seems to be that since the FAA's failure to disclose the defect in or to deny certification of the DeHavilland Dove aircraft could be characterized as the "but for" cause of the accident, the FAA increased the risk of injury. But if all that were required to satisfy Section 324A(a) was a showing of "but for" causation, there would be no reason to have subsections (b) and (c). At a minimum, liability predicated on a claim that the good samaritan increased the risk of harm requires proof of some affirmative act that added peril to the plaintiff's situation. See Restatement (Second) of Torts, *supra*, at 143.<sup>7</sup>

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<sup>6</sup> Even more clearly irrelevant are cases relied upon by United Scottish (Br. 18-19) that have held private persons liable for violating the FAA's regulations. The court below in its first decision rejected the argument that the United States could be held liable under a negligence per se theory (614 F.2d 188, 193) and United Scottish never challenged that ruling.

<sup>7</sup> Compare *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973), in which the government inspector insisted on a modification to the fuel line that was the proximate cause of the



Respondents Mascher and United Scottish (Mascher Br. 13-23; United Scottish Br. 24-25) argue that their reliance on the FAA's inspection and certification process was reasonable because the FAA has represented in various contexts that the airplanes it certifies are safe. Initially, we note that virtually all of the public statements cited by respondents post-date the accidents in these cases. Moreover, as we indicated in our opening brief (U.S. Br. 34-35), the reliance required by the good samaritan doctrine is not the general knowledge that a government agency exists or even that it performs a safety related function, but rather that because of the FAA's actions the injured party has foregone alternative safety precautions. Respondents do not and could not make any such claim in their briefs.

Similarly, respondent Varig relies heavily (Br. 31, 34) on the illustrations to Section 324A of the Restatement.<sup>\*</sup> What Varig overlooks is that examples 2 and 3, which involve private inspectors, illustrate liability under Section 324A(b)—when the good samaritan undertakes to perform the duty owed by another. This was not the basis for liability adopted by the court of appeals and could not be a proper basis for liability under the facts of these cases. Moreover,

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accident. Here, there is no evidence that any action of the FAA rendered the aircraft more dangerous than it was as constructed or modified by the manufacturer or installer. Compare *Hylm v. United States*, 715 F.2d 1206, 1210-1213 (7th Cir. 1983).

<sup>\*</sup> Respondent United Scottish (Br. 16) persists in its contention that the FAA has "preempt[ed] the field" of airline safety. This contention utterly ignores the continuing duty of manufacturers and operators to inspect their aircraft for compliance with all safety requirements.

Varig's entire analysis of the good samaritan doctrine reflects a basic misunderstanding of the role of the traditional good samaritan. Liability under that doctrine arises from the fact that the good samaritan takes over responsibility for the protection of third persons, and thereby engenders immediate reliance. Thus, in a typical case such as the elevator example relied upon by Varig (Br. 31), the building owner, if sued, could implead the elevator inspector, who would be fully liable for the failure to inspect because of his contractual assumption of that duty. By contrast, if an injured party were to sue an airplane manufacturer such as Boeing, there would be no basis for the manufacturer to implead the United States, because the manufacturer in no way relies upon the United States to satisfy its duty to inspect the product it sells.

Respondent Varig (Br. 32) responds to our claim that no liability is proper under the Restatement because respondents are too far removed from the certification process by arguing that we have cited no cases supporting such a limitation. But limitations on liability based on the remoteness of the relationship between the parties is a pervasive concept in tort law, see W. Prosser, *Handbook of the Law of Torts* 324 (4th ed. 1971), and it is respondents' obligation under 28 U.S.C. 1346(b) to demonstrate that state law would hold a private person liable for conduct like that engaged in by the federal government. Their failure to show that any state court has ever held anyone liable as a good samaritan for conduct even remotely comparable to these cases compels dismissal of their suits under Section 1346(b).<sup>9</sup>

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<sup>9</sup> Respondent Varig repeatedly asserts (Varig Br. 13-16, 17) that its employee, Ritter, relied on the FAA's inspections,

3. In arguing that the discretionary function exception does not apply here, respondents take an unduly narrow view of the FAA's certification activities. The issuance of an airworthiness certificate is not the simple "mechanical, operational task" described by respondents (see Varig Br. 41). The FAA has issued numerous regulations to help make aircraft safer, but the issuance of these regulations has not lessened the governmental-regulatory decision that the FAA must make each time an applicant seeks a certificate. In addition, as we explained in our opening brief (U.S. Br. 42-46), the FAA must make a variety of discretionary judgments in determining how to enforce the applicable regulations. First, it must decide which parts of the airplane it will inspect and which it will rely upon the designated engineering representatives of the manufacturer to inspect.<sup>19</sup>

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but *not* on the FAA's airworthiness certificate. Initially, this argument is inadequate to satisfy the good samaritan doctrine; respondent must show that the reliance was reasonable. Ritter's reliance was totally unfounded since he assumed that the "U.S. FAA physically inspects *that* aircraft \* \* \* before issuing the individual aircraft an 'airworthiness certificate'" (Varig Br. 18; emphasis added). Varig does not dispute our claim (U.S. Br. 8) that the FAA itself inspects virtually no finished aircraft as they come off the assembly line at the manufacturer's plant. Thus, Ritter's reliance was based on a complete misconception of the specific activities of the FAA. Moreover, no purchaser of an aircraft would fail to require the seller to produce an FAA certificate. Thus, it is hardly credible that there was reliance on the FAA's inspection but no reliance on the certificate.

<sup>19</sup> Relying upon the 1957 manual, respondents assert (Varig Br. 42 n.36) that the United States is liable for the negligence of designated engineering representatives who are hired by the manufacturer to conduct inspections. The statement in the manual that DER's are federal employees is plainly incorrect today; this Court's decision in *United States v. Orleans*,

Second, the FAA must decide whether the airplane at its various stages complies with the general safety standards. Obviously, any discretionary function can be disaggregated so that a particular decision or non-decision made as part of the regulatory process appears to lose its character as a discretionary function; no doubt some of the actions undertaken by the government in inspecting and handling the fertilizer in *Dalehite v. United States*, 346 U.S. 15 (1953), if viewed in isolation, could be characterized in some sense as operational. But this Court rejected that reasoning and held that the entire process was itself a discretionary function. 346 U.S. at 36. Similarly, here, the entire certification process is regulatory and judgmental in nature and therefore not a proper basis for liability under 28 U.S.C. 2680(a).<sup>11</sup>

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425 U.S. 807 (1976), makes clear that the United States is not liable for acts of negligence by such independent contractors.

<sup>11</sup> Respondent Varig makes a plain meaning argument (Varig Br. 39-40) that Section 2680(a) does not immunize any allegedly negligent governmental action that is undertaken pursuant to a valid regulation. This argument involves, however, a plain misreading of the provision. The first clause of Section 2680(a) is intended to preclude liability based on allegations that an agency regulation or statute is itself invalid or unconstitutional. *Dalehite v. United States*, *supra*, 346 U.S. at 27, quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 6, 25, 29, 33 (1942) (remarks of Assistant Attorney General Shea). The reference to the "exercise of due care" obviously means action that is faithful to the command of the allegedly ultra vires regulation or statute. The second clause of Section 2680(a) more broadly immunizes any discretionary action, whether undertaken pursuant to a valid regulation or not. This is precisely how the Court interpreted the second clause in *Dalehite*: "[w]here there is room for policy judg-

4. Respondents rely (Varig Br. 47-50; Mascher Br. 23; United Scottish Br. 30-32) almost entirely on *Block v. Neal*, No. 81-1494 (Mar. 7, 1983), for their argument that the misrepresentation exception in 28 U.S.C. 2680(h) does not apply to their claims. Respondents are simply wrong in asserting that the supervisory activity in *Neal* was not crucial to that decision. The Court repeatedly emphasized the allegation in the complaint that the Farmers Home Administration breached its duty to supervise construction of Neal's house. Slip op. 8, 9. The FAA does not undertake to supervise construction as part of its certification process, nor do respondents contend that it does.

That respondents' claims are classic examples of claims for misrepresentation is illustrated by comparing these cases with the example in the Restatement of Torts § 311 (1934), quoted at page 47 of our opening brief. In the illustration, the inspector certified the product; the product was used by its owner; and a third party was injured. The suit by the third party is for negligent misrepresentation, and it makes no difference whether the injured party personally read the certificate or not (compare Varig Br. 49). Respondents' claims are indistinguishable from those in the Restatement; indeed, respondents make no at-

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ment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 36. Since there was no question that the government's regulatory program in *Dalehite* was a valid governmental function, it necessarily follows that allegedly negligent conduct undertaken pursuant to a regulation can still fall within the ambit of the second prong of Section 2680(a).

tempt to distinguish them. Accordingly, the misrepresentation exception in Section 2680(h) bars these suits because they arise out of misrepresentation as that tort was understood in 1946 when Congress passed the Tort Claims Act. See *United States v. Neustadt*, 366 U.S. 696 (1961).

### CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted,

REX E. LEE  
*Solicitor General*

JANUARY 1984

No. 82-1349  
No. 82-1350

FILED  
OCT 14 1983  
ALEXANDER L. STEVAS,  
CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

UNITED SCOTTISH INSURANCE CO., *et al.*,

*Respondents.*

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UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

S. A. EMPRESA DE VIACAO AEREA RIO  
GRANDENSE (VARIG AIRLINES), *et al.*,

*Respondents.*

---

BRIEF OF *AMICUS CURIAE*  
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF RESPONDENTS

---

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### QUESTION PRESENTED

The Association of Trial Lawyers of America will address the following question:

Whether negligence in the inspection of an aircraft to determine its safety and airworthiness by Federal Aviation Administration employees or delegates is actionable under the Federal Tort Claims Act?

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UNITED STATES OF AMERICA, PETITIONER

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v.

S.A. EMPRESA DE VIACAO AEREA RIO  
GRANDENSE (VARIG ARILINES), ET AL.  
RESPONDENTS

---

BRIEF OF AMICUS CURIAE  
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF RESPONDENTS

---

STATEMENT OF INTEREST

The Association of Trial Lawyers of America is a voluntary, nationwide organization of over 55,000 members, including several hundred in Canada and other foreign countries. Its



membership includes judges and law teachers, but primarily consists of lawyers who specialize in litigation, and particularly in the representation of plaintiffs in civil cases involving injuries and death to people and damage to property.

The men and women of the Association are pledged to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law. Through its appropriate officers and committees, the Association has authorized participation in this case as amicus curiae. This brief is filed with the written consent of all the parties.

The Association is concerned with this action, because the decision in this case will have an immediate effect on similar cases that may now be pending throughout the country as well as on the development of legal doctrine.

The Association files this Brief in support of respondents' position that the negligent inspection of aircraft is actionable under the Federal Tort Claims Act.

#### STATEMENT OF THE CASE

In these consolidated cases, the common question presented concerns the liability of the United States under the Federal Tort Claims Act (FTCA) 28 U.S.C. 1246, 2671-2680, for the operational negligence of its employees in performing inspection activities voluntarily undertaken by the Government. The plaintiffs in these cases are owners and passengers of aircraft and the negligence is that of Federal Aviation Administration employees or delegates who inspected aircraft and evaluated and approved aircraft design. The subject aircraft were negligently found to be airworthy and to have met minimum safety

requirements when in fact they were not air-worthy and were unsafe.

In United States v. United Scottish Insurance Co., No. 82-1350, a DeHavilland Dove caught fire and crashed as a result of a defective and faulty fuel line. The particular fuel line was not adequately clamped and contained a faulty connection. When exposed to normal aircraft vibration, the defective fuel line allowed gasoline to leak and ignite. The gasoline line and heater had been separately added to the plane in 1966.

After its installation, the FAA inspected the line and heater and issued a Supplemental Type [airworthy] Certificate, but negligently failed to detect the potentially deadly defect in the design and installation. After trial, and the taking of additional testimony on remand, the District Court found the negligent inspection of the United States to be the

proximate cause of the injury to the aircraft owner and passengers. The Court explicitly found that both the owner and passengers had relied upon the careful performance of an inspection by the FAA. On appeal, the Ninth Circuit affirmed the judgment of the district court.

In United States v. Varig Airlines, No. 82-1349, a 707 jet airliner crashed as a result of an in-flight fire in an aft bathroom. The genesis of the fire was a trash disposal container whose design did not meet minimum standards. Both the manufacturer's design plans, and the particular aircraft itself, had been inspected by the FAA and certified as airworthy. The District Court granted the government's motion for summary judgment on the ground that negligent certification was not actionable. The Ninth Circuit reversed and reinstated the complaint.

#### SUMMARY OF ARGUMENT

It is well established that the United States is liable under the Federal Tort Claims Act (FTCA) for the operational, non-policy level negligence of its employees. The theory of liability in these actions -- negligent performance of an operational level inspection conducted to determine whether an aircraft is safe -- is a recognized aspect of the common law Good Samaritan doctrine. It falls squarely within the scope of decisions of this Court applying the Good Samaritan rule in FTCA suits.

Under the FTCA, the government may be cast in damages for its negligent acts "like any private individual." Although the Government contends that inspection of aircraft for safety and airworthiness is a "uniquely" governmental function, that does not preclude liability for negligence in carrying out that

activity. This Court has repeatedly refused to carve out a "governmental function" exception to the FTCA which would override liability for misfeasance or nonfeasance in uniquely governmental roles. The United States has been held liable for negligence in a variety of uniquely governmental services, such as firefighting, air traffic control and even prison operation.

At the same time, the "Good Samaritan" doctrine, which common law courts have routinely applied to negligent inspections of property, applies with special force to negligent inspection of an aircraft. By legislation, regulations and pre-emptive activity, the government has occupied the field of aircraft inspection and certification. In doing so, it has fostered justifiable and reasonable reliance by aircraft owners and the public upon careful performance of an activity aimed

at public safety. Indeed, it is these "safety" inspections which underlie the public's perception that aircraft manufactured in the United States are safe and reliable and that they do not incorporate design features which will compromise safety of flight.

Neither the "discretionary" function or the "misrepresentation" exceptions override the general liability provisions of the Tort Claims Act. As the Solicitor General has conceded, and as this Court has recently ruled in Block v. Neal, 51 U.S.L.W. 4237 (1983), the misrepresentation exception is inapplicable to a claim of negligent inspection. And, as the decisions of this Court plainly hold, the discretionary function exception is not applicable to operational negligence.

The judgments of the Ninth Circuit are thus entirely in harmony with the governing



decisions of this Court and should be affirmed.

#### POINT I

##### THE GOVERNMENT IS LIABLE FOR CONDUCTING NEGLIGENT SAFETY INSPECTIONS OF AIRCRAFT

Although the liability of the United States for negligent inspection of aircraft has not been addressed by this Court, the principles articulated in prior decisions make it manifest that the United States is liable for negligence in that activity.

- a. Negligent Inspection of Aircraft by Government Employees or Delegates is Actionable Under the Federal Tort Claims Act

Decisions of this Court have firmly established the principle that the government is liable for negligence under the FTCA, even when it claims to be acting in a "uniquely"

governmental or regulatory capacity. Indeed, the prime contention of the government here -- that it cannot be liable for uniquely governmental or regulatory conduct since it can only be responsible for actions as a private person -- was definitively rejected by this Court as long ago as 1955.

In Indian Towing Co. v. United States, 350 U.S. 61 (1955), where the United States was cast in damages for the negligent operation of a lighthouse, it urged before this Court that there was no FTCA liability "for negligent performance of 'uniquely governmental functions.'" Id., at 64. In rejecting that interpretation of the FTCA, the Court declined to be drawn "into the 'non-governmental' -- 'governmental' quagmire that has long plagued the law of municipal corporations..." or to adopt a rule that would require "distinctions so finespun and capricious as to be almost

incapable of being held in the mind for adequate formulation." Id. at 65, 68.

That same year, with just a citation to Indian Towing, this Court affirmed a judgment against the United States for negligence of air traffic controllers in regulating air traffic. United States v. Union Trust Co., 350 U.S. 907, aff'g sub. nom., Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955). As the citation to Indian Towing reflects, this Court again rejected the contention of the government that since it was acting in a unique governmental role as a regulator of air traffic it could not be liable.

This Court reiterated the import of Indian Towing in Rayonier, Inc. v. United States, 352 U.S. 315 (1957), where the United States was sued for the negligence of its Forest Service firefighters. Rejecting the

lower courts' reliance upon the principles of municipal corporation law -- which hold that a municipality that undertakes to provide a service owes a duty to the public at large and not an actionable duty to any particular individual -- the Court emphasized:

We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.

Id. at 319.

Most importantly, the Rayonier Court brushed aside the spectre of "novel and unprecedented" liability forecast by the government, pointing out that "the very purposes of the Tort Claims Act was to ... establish novel and unprecedented governmental liability."

As to the government's admonition that "a heavy burden may be imposed on the public treasury," the Court responded:

Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden of each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. And for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it is subject to liability for the negligence of its firemen. There is no justification for this Court to read exemptions into the Act beyond those provided by Congress.

Id. at 320.

More recently, in United States v. Muniz, 374 U.S. 150 (1963), the FTCA was held applicable to allow claims of negligent supervision

and medical malpractice by prisoners against the United States for the actions of federal prison employees. Again relying upon Indian Towing and Rayonier, the Court succinctly summarized the governing principles: "The Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." Id. at 159.

Neither the government's allegation here that aircraft inspection is a governmental regulatory activity, nor its articulated concern for the alleged public fisc consequences of permitting negligent inspection actions thus provide any basis for carving out a new exception to the FTCA. Indeed, the government's attempt to cloak itself in the garb of a municipal corporation -- and claim that it

owed no duty to any particular individual because it owed a duty to the public at large -- is unavailing under the FTCA.

As long as the general principles of applicable state law would allow recovery for the negligence at issue against a private person -- as they plainly do here -- the alleged "governmental" nature of the conduct does not bar recovery.<sup>1</sup>

b. Negligent Inspection is a Recognized Aspect of the Good Samaritan Doctrine

As a general matter of tort law, there can be little question that an individual who retains an inspection company to inspect property, be it a house, an automobile or an aircraft, may recover for losses sustained if the

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<sup>1</sup> In any event, it is plain that inspection of property and mechanical devices is an activity engaged in by private entities as well as governmental. As the trial court concluded, prior to 1926 inspection of aircraft was wholly in private hands.



inspection is performed in a careless fashion. See, e.g., Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912). When the government voluntarily places itself in the position of inspector, there is simply no justification for declining to impose the same measure of liability and responsibility -- a duty to act with reasonable care. That is the very essence of the Good Samaritan doctrine.

In fact, negligent inspection of property is one of the examples cited by the Restatement of Torts (Second) as a classic illustration of the Good Samaritan rule.<sup>2</sup> Negligent

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<sup>2</sup> Restatement of Torts (Second) § 324A, illustration 4:

A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have

(footnote continued)

inspection liability is traditionally imposed upon one who performs a safety inspection, without regard to whether the inspector also had an obligation to perform maintenance or repair services. The voluntary performance of the inspection itself, and not any "guarantee" that the property would be maintained in a safe condition, provides the foundation for Good Samaritan liability. Restatement (Second) of Torts, § 324A, illustration 4; Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912) (insurance company undertook to inspect to determine safety compliance; no obligation to repair or maintain), Van Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 19 A. 472 (1890) (insurance company inspected

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(footnote continued from previous page)  
disclosed, the elevator falls and injured C, a workman employed by A Company. B Company is subject to liability to C.

for safety; no undertaking to repair or maintain); Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961) (liability for failure to properly inspect); McDonnell v. Wassenmiller, 74 F.2d 320 (8th Cir. 1934) (engineer undertook to inspect and oversee construction for compliance with design; liable for failing to discover construction impropriety).

It is upon the basis of the Good Samaritan doctrine that this and other Courts have imposed liability for the negligence of air traffic controllers. E.g., United States v. Union Trust Co., 350 U.S. 907, supra; Ross v. United States, 640 F.2d 511, 519 (5th Cir. 1981); Freeman v. United States, 509 F.2d 626, 629 (6th Cir. 1975); Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 236 (2d Cir. 1967). Had the airline industry itself undertaken to organize and retain a contractor to provide air traffic control services, the contractor

would be obliged to act with due care. Once the government voluntarily interposes itself into the situation, and engenders reliance by aircraft owners, pilots and the traveling public, it also becomes obligated to refrain from negligence -- a minimal level of responsibility to be sure. E.g., Ross v. United States, 640 F.2d at 519; Ingham v. Eastern Airlines, Inc., 373 F.2d at 236.<sup>3</sup>

Those same considerations dictate the imposition of liability upon the United States for negligent inspection. Indeed, in many respects negligence on the part of an air traffic controller is akin to negligence on the part of an aircraft inspector: like an inspector, a controller acts as a trained

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<sup>3</sup> In a similar vein, when the government undertakes to operate lighthouses, or provide fire protection services, it also becomes duty bound to exercise reasonable care in the provision of those services and is held liable for its failure to do so. E.g., Indian Towing; Rayonier.

observer and reporter of the safety of conditions, such as weather and air traffic. When the controller carelessly observes or carelessly reports, he or she is negligent. E.g., Stork v. United States, 430 F.2d 1104 (9th Cir. 1970); Eastern Airlines v. United Trust Co., 221 F.2d at 78. The government is then liable to the pilot who relied on the specific conduct of the controller, as well as the passengers who generally rely upon the careful performance of the duty. E.g., Indian Towing, supra, (damages sustained by vessel owner); United States v. Union Trust Co., supra, (passengers); Ross v. United States, supra, (pilots and passengers); Stork v. United States, supra, 430 F.2d at 1108 (pilots specific reliance entitles passengers to maintain action).

It is plain that an inspection of property, whether performed by the government or a

private party, creates the type of reliance necessary to sustain a Good Samaritan claim. The owner of the inspected property justifiably relies upon the government inspection,<sup>4</sup> and continues to use defective property, without seeking or obtaining the necessary remedial steps and without knowledge of a potential or actual danger. The passenger's reliance is his or her conduct in entering into the aircraft, conduct necessarily undertaken in reliance upon the careful performance of required safety inspections.<sup>5</sup> It is that

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<sup>4</sup> The Government seems to suggest that no individual has a right to rely upon FAA inspections, contending that the aircraft owner has the "prime" responsibility to ensure safety. If the Government is suggesting that each owner must conduct his or her own minute inspection of all aircraft design components and systems immediately after an FAA inspection, then it is saying that all FAA inspections are purposeless and meaningless, a proposition directly refuted by the applicable statutes and regulations, as well as the Trial Court's findings of fact in United Scottish.

<sup>5</sup> To the passenger of an aircraft, or an  
(footnote continued)

precise type of reliance that was the predicate for common law recognition of a negligent inspection action pursuant to the Good Samaritan rule. See, e.g., Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912); Van

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elevator for that matter, the very act of boarding is necessarily conduct in reliance upon a careful inspection, without regard to whether the passenger has a conscious appreciation of the fact that an inspection was conducted or is aware of who performed it. See Restatement (Second) of Torts § 324A, illustration 4. In fact, a passenger in that situation simply has no way to avoid the consequences of a negligent inspection.

In other situations, by contrast, such as where the government or a private entity has undertaken to warn of a danger by operating a lighthouse or posting a railroad crossing guard, reliance is not possible unless there is first a conscious awareness by the victim that someone has undertaken to warn. See Restatement (Second) of Torts, § 324A, illustration 5. In the latter situation, absent a conscious awareness of the warning, the individual should, and is able to, exercise care for himself or herself. Conscious awareness of the voluntary undertaking is thus a necessary element only when reliance is not possible without such awareness.



Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 19 A. 472 (1890); McDonnell v. Wasen-  
millers, 74 F.2d 320 (8th Cir. 1934) (engineer who had duty to inspect steam line for compliance with design and proper construction liable for negligence to an individual injured by escaping steam). It is also that exact type of reliance that forms the predicate for the rulings of this and other Courts allowing aircraft passengers to recover from the government for the negligence of an air traffic controller. E.g., United States v. Union Trust Co., 350 U.S. 907, supra.

It is thus surprising that the Government would take issue with the existence of actual reliance in the circumstances here. A review of the opinions of the Courts below in United Scottish reveals that the Ninth Circuit specifically endorsed the district court's "holding that the victims relied on the F.A.A.

inspection," 692 F.2d at 1209.<sup>6</sup> In turn, the district court explicitly found as a fact both that "[p]laintiff John W. Dowdle, Jr. [the owner of the aircraft] specifically relied upon the inspection of the aircraft herein" and that each individual passenger likewise relied upon the inspection. (Findings of Fact 31, 32, 35, 62, 63, 64, 72).

The government is simply incorrect, then, in its suggestion that the Ninth Circuit dispensed with the reliance element of the claim in conflict with other circuits.<sup>7</sup> To the

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<sup>6</sup> The Ninth Circuit, in addition to noting the finding of actual reliance, went on to point out the government could have reasonably anticipated that reliance. 692 F.2d at 1211.

<sup>7</sup> The cases cited by the government in any event are inapposite. In Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978), for instance, the government was sued for failing to conduct any inspection in the first instance and not for a negligent inspection which it had voluntarily undertaken. The issue there thus was whether any duty existed to inspect at all, an entirely different questions than that (footnote continued)

contrary, the Court expressly required reliance, and there are factual findings which are more than ample to supply the type of reliance necessary here.

Finally, the governing state law without question recognizes Good Samaritan liability. In fact, a situation strikingly similar to the one here was involved in two of the California Supreme Court cases which applied the Good

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posed here, which is whether the government owes a duty to use due care once it undertakes an inspection.

Likewise, in Rayonier v. United States, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982), there was no reliance upon a negligent inspection. Rather, the inspector there merely granted an extension of time to correct known defects. As the court concluded, the equipment "was not shown to have any defects which were known to the inspectors but hidden from the decedents ..." 660 F.2d at 1143. Finally, in Gelley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558 (8th Cir. 1979) the court merely concluded that no claim was stated and no duty was owed under Minnesota Municipal corporations law, a rather unique conclusion justified by the fact that Minnesota treats municipal corporations as private persons. 610 F.2d at 561.

Samaritan rule, Coffee v. McDonnell Douglas Corp., 8 Cal.3d 551, 503 P.2d 1366 (1972), and Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).<sup>8</sup> In Coffee, an employer who was under no duty to do so provided a physical examination for a prospective employee, the plaintiff. The purpose of the examination was not to render treatment, but to determine the plaintiff's fitness for employment, and thus was analogous to a safety inspection of property.

The employer negligently failed to become aware of and to report to the plaintiff findings which indicated the presence of bone cancer. Of course, the plaintiff relied upon the examination and refrained from seeking the needed corrective action -- medical treatment -- precisely like a property owner and others

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<sup>8</sup> Accord, e.g., Schwartz v. Helms Bakery, Ltd., 67 Cal.2d 232, 238, 430 P.2d 68 (1967) ("he who undertakes to do an act must do it with care").

rely upon a negligent inspection and refrain from seeking mechanical correction.

Applying the Good Samaritan doctrine, the California Supreme Court upheld the cause of action against the employer for the negligent examination. Likewise, the Dahms case imposed liability on a company for negligent inspection that led to the injury of a person using an elevator. The California Courts have thus upheld Good Samaritan claims exactly akin to negligent inspection.

In sum, the negligent inspection theory is but a classic illustration and application of the Good Samaritan doctrine adopted by this and other Courts as a basis for the imposition of FTCA liability. No reason has been shown, and indeed there is none, for overriding that principle in the present setting.

## POINT II

### NEITHER THE MISREPRESENTATION NOR THE DISCRETIONARY FUNCTION EXCEP- TIONS ARE APPLICABLE

#### a. Misrepresentation

As the Solicitor General now concedes, and this Court recently held, the misrepresentation exception to the Tort Claims Act, 28 U.S.C. § 2680(h), does not bar a Good Samaritan claim for negligent inspection of property. Block v. Neal, 103 S. Ct. 1089 (1983).

Under the plain import of Neal, the misrepresentation exception bars an action only insofar as it seeks recovery exclusively based upon a misrepresentation of fact, and involves a claim in the nature of the common law action of deceit. 51 U.S.L.W. at 4239-4240, and n.5. It does not preclude claims premised upon other conduct, such as the failure to exercise due care in conducting an inspection, even though reliance and a "generic misrepresenta-

tion" may be incidentally involved. Id. at 4240 and n.7. Inasmuch as the claims here are squarely premised upon a negligent inspection -- and not a misrepresentation akin to the common law action of deceit -- the misrepresentation exception is of no moment.

b. Discretionary Function

In evaluating a claim of discretionary function, it is first necessary to isolate the conduct which is the gravamen of the lawsuit. See, e.g., 28 U.S.C. § 2680(a); Dalehite v. United States, 346 U.S. 15 (1953). It is at that initial point that the government's invocation of the discretionary function exception falters. For, there is nothing more at issue here than the garden-variety operational negligence of an employee in conducting an inspection.



It is now settled that the discretionary function exception applies only to political or policy judgments made at a planning rather than an operational level. Dalehite v. United States, supra, at 42; Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975); United States v. Union Trust Co., 350 U.S. 907, supra; Ingham v. Eastern Airlines, Inc., 373 F.2d at 238, supra. As one Circuit explained, there is a fundamental basis for the distinction:

The discretionary function exception does not insulate the Government from liability for all mistakes of judgment of its agents, but only for significant policy and political decisions, the types of governmental decisions which should not be circumscribed by customary tort standards. The word "discretion" in a statute is not used in a weak sense to mean "judgment" or "discernment" but rather in the strong sense to mean that an official has the "power of free decision" and is not bound by tort standards set by another authority such as a court.

Miller v. United States, 583 F.2d 857, 866, (6th Cir. 1978). In a variety of circumstances, the day-to-day activities of employees whose role it is to apply and implement existing standards, rules and regulations have been held not to be discretionary functions.<sup>9</sup>

The government does not seem to claim that the ordinary activities of an inspector -- who applies existing policies and judgments rather than initiating or making them -- is anything other than operational activity. Nor could it, in view of this Court's explicit recognition in Indian Towing v. United States, 350 U.S. at 62, 64, that the failure to properly inspect or repair a lighthouse occurred

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<sup>9</sup> E.g., Indian Towing v. United States, 350 U.S. at 62, 64 (negligent inspection and failure to repair government lighthouse is conduct at operational level); Madison v. United States, 679 F.2d 736, 741 (8th Cir. 1982) (once decision is made by government to conduct inspections, implementation of that decision occurs at operational level).

at the operational level of governmental activity.

Instead, the government endeavors to shift the focus away from the specific facts of the case -- where under applicable regulations the government was undisputedly required to inspect, negligently carried out that function, and failed to discover a specific defect -- to the larger question whether it should be required to discover every defect in every aircraft and become an insurer of aircraft safety.

The government's position effectively amounts to a reiteration of its substantive position that it owes no duty to "guarantee" the safety of an aircraft. Aside from the fact that the precise argument was made and rejected in Indian Towing,<sup>10</sup> that position

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<sup>10</sup> In Indian Towing, where liability was imposed for failure to inspect or repair a lighthouse, the Solicitor General had urged  
(footnote continued)

entirely misses the point. The government here is not being held liable for failing to "guarantee" the safety of an aircraft, nor is it being held liable for failing to discover every defect in every aircraft. It is responsible, however, for the carelessness of an employee in conducting an inspection which the government voluntarily obligated itself to perform and for not discovering a specific and expressly prohibited unsafe condition.

The basis for that Good Samaritan liability is not any contractual or other undertaking by which the inspecting party "guarantees" safety. Instead, the basis of liability is the unmistakable fact that the government voluntarily made a decision to inspect aircraft and then implemented that decision in a

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the precise argument again offered by United States: "In undertaking to provide aids to navigation, the United States does not act as a guarantor or an insurer of their faultless performance." 100 L.E.d. at 52.

negligent fashion. Had the government employees implemented the decision in a proper and careful manner, the defect would have been discovered by the person whose duty it was to discover it, and the accident avoided entirely. Just as in Indian Towing, there need have been no guarantee of safety, but only an exercise of ordinary care to prevent the tragedies that occurred here. Obviously, then, there is involved here no question of policy judgments concerning the proper role of the FAA in the scheme of aviation regulation, and no exercise of discretion.

Finally, in a very real sense, the government's argument would afford a sweeping breadth to the discretionary function exception. In effect, the government is contending that whether it may be held liable for the consequences of its actions is a discretionary judgment, i.e., it is for the FAA to decide,

as a discretionary matter, whether it will undertake to "guarantee" safety.

Under that line of reasoning, even though the government undertakes to perform a particular act, and even though as a legal consequence it becomes obligated to act with due care, it cannot be held liable for negligence because it did not make a "policy decision" to "guarantee" safety. Of course, that approach would run roughshod over virtually every ordinary FTCA negligence action. In almost every instance of operational activity, it may be urged that there is an underlying discretionary judgment as to the proper scope of liability for negligent performance of that activity. No authority cited by the United States even suggests that the discretionary function exception should be afforded so unlimited a reach.

However viewed, then, the negligent actions of an FAA inspector cannot be talismanically transformed into a planning level policy or political judgment.

### CONCLUSION

Settled principles of law largely govern disposition of these cases. Most fundamentally, there is no "governmental" function exception to the Federal Torts Claims Act for "regulatory" or sovereign activity. Under the Good Samaritan doctrine, the Government becomes duty bound to exercise due care once it decides to act at all. Those principles -- which result in the imposition upon the government of the normal, minimal obligation of reasonable care owed by private persons -- validate the negligent inspection theory of liability. In any particular instance, of course, the fact of negligence must be proven



to the satisfaction of a trial judge before application of the theory will result in recovery.

Nor does the discretionary function exception bar recovery for the negligent inspections at issue. At bottom, the careless actions of an FAA employee in conducting an inspection cannot be transformed into planning level political or policy judgments. An employee carrying out and implementing regulations and standards is, as this and the other Court's have concluded, acting at the operational level.

In each case, therefore, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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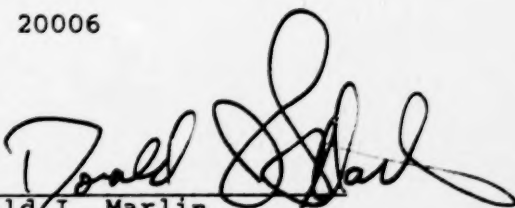
Donald I. Marlin, an attorney for Amicus Curiae and a member of the Bar of this Court, certifies that on the 14th day of October, 1983, copies of the foregoing Brief were served by mail upon all parties required to be served:

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CASE NBR 82-1-01349 CFX  
 SHORT TITLE United States  
 VERSUS S. A. Empresa De Viacao

CASE STATUS: GRANTED  
 DOCKETED: Feb 10 1983

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1982		Application for extension of time to file petition and order granting same until February 11, 1983 (Rehnquist, December 28, 1982).
2	Feb 10 1983	G	Petition for writ of certiorari filed.
4	Mar 7 1983		Order extending time to file response to petition until April 15, 1983.
5	Apr 15 1983		Brief of respondent Varig Airlines in opposition filed.
6	Apr 15 1983		Brief of respondent Emma Rosa Mascher, et al. in opposition filed.
7	Apr 20 1983		DISTRIBUTED. May 12, 1983
9	May 16 1983		Petition GRANTED. The case is consolidated with 82-1350 and a total of one hour is allotted for oral argument. *****
10	Jun 2 1983		Record filed.
11	Jun 2 1983		Certified original record & proceedings, 11 vols., received.
13	Jun 29 1983		Order extending time to file brief of petitioner on the merits until July 30, 1983.
14	Jul 29 1983		Order further extending time to file brief of petitioner on the merits until August 13, 1983.
15	Aug 12 1983		Appendix of petitioner filed. VIDED. * (photographic exhibits)
16	Aug 13 1983		Brief of petitioner United States filed. VIDED.
17	Aug 12 1983		Lodging received. To be returned to the Department of Justice.
18	Aug 15 1983		Joint appendix filed. VIDED.
19	Aug 26 1983	D	Motion of respondents for divided argument filed.
20	Sep 7 1983		Opposition of respondents Mascher, et al. to motion of respondents S.A. Empresa De Viacao Aerea Rio Grandense.

{SHDKT }

## PROCEEDINGS AND ORDERS

DATE: 020784

CASE NBR 82-1-01349 CFX  
 SHORT TITLE United States  
 VERSUS S. A. Empresa De Viacao

CASE STATUS: GRANTED  
 DOCKETED: Feb 10 1983

Entry	Date	Note	Proceedings and Orders
20	Sep 7 1983	Opposition of respondents Mascher, et al. to motion of respondents S.A. Empresa De Viacao Aerea Rio Grandense, et al. for divided argument filed.	
22	Sep 12 1983	Order extending time to file brief of respondent on the merits until October 14, 1983.	
23	Oct 3 1983	Motion of respondents for divided argument DENIED.	
24	Oct 7 1983	Copies of despositions of Rudolph Kapustin, USDC, CDCA, received.	
25	Oct 11 1983	Order further extending time to file brief of respondent on the merits until October 28, 1983.	
26	Oct 14 1983	Brief amicus curiae of Assn. of Trial Lawyers of America filed. VIDE.	
27	Oct 28 1983	Brief of respondents United Scottish Insurance Co., et al. filed. VIDE.	
28	Oct 28 1983	Brief of respondents Emma Rosa Mascher, et al. filed.	
29	Oct 28 1983	Brief of respondent Varig Airlines filed. VIDE.	
30	Oct 28 1983	Lodging received entitled "Type Certification".	
31	Nov 4 1983	Deposits and exhibits received.	
32	Nov 16 1983	CIRCULATED.	
33	Nov 23 1983	SET FOR ARGUMENT. Wednesday, January 18, 1984. This case is consolidated with No. 82-1350. (1 hour) (1st case)	
34	Jan 10 1984	X Reply brief of petitioner United States filed. VIDE.	
35	Jan 18 1984	ARGUED.	
36	Jan 24 1984	P Motion of respondent S.A. Empresa De Viacao Aerea Rio Grandense for leave to file a supplemental brief after argument filed.	